Supreme Court, U.S.
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In The Supreme Court of the United States

DIAMOND OFFSHORE DRILLING, INC.,

Petitioner,

versus

JIMMY LEWIS,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the burden of proof under the Jones Act, 46 U.S.C. § 30104 *et seq.*, formerly 46 App. U.S.C. § 688, allow for a lower standard of admissibility of evidence than mandated under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)?

II. Under general maritime law, can a maritime employer be required, contrary to well-settled federal law, to pay maintenance and cure when:

(a) the plaintiff is diagnosed with an *incurable* disease;

(b) it is beyond the point when plaintiff has reached maximum medical improvement ("MMI");

(c) there is no legal obligation to pay cure into the *future*; and

(d) others, including Medicare/Medicaid and health care insurance, have paid for plaintiff's medical expenses with no out-of-pocket expense to plaintiff.

LIST OF PARTIES

The only parties in this matter are Petitioner, Diamond Offshore Drilling, Inc. and Respondent, Jimmy Lewis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner, Diamond Offshore Drilling, Inc., is a nongovernmental publicly traded corporation. Loews Corporation owns more than 10% of the stock of Diamond Offshore Drilling, Inc.

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OPINIONS BELOW

Plaintiff/Respondent, Jimmy Lewis, originally filed a Seaman's Petition in the Civil District Court for the Parish of Orleans alleging that the named defendants owned and/or operated the jack-up rig, *Ocean Spartan*, while plaintiff was employed as a crew member of the rig in the territorial waters of the country of Venezuela. He alleged that he contracted a rare neuromuscular disease, sporadic inclusion body myositis ("SIBM"), while in the service of the rig in Venezuela. Despite the undisputed facts that SIBM is an incurable disease and its cause is unknown, the jury awarded Mr. Lewis $27,116.00 in maintenance and $1,710,830.60 in cure, as well as $5,409,655.00 in damages for future medical care, income loss, future lost wages and pain and suffering. The trial court's judgment is attached hereto as App. 49. On appeal, the Fourth Circuit Court of Appeal for the State of Louisiana acknowledged that there was no valid scientific evidence of causation and that, even under the slight burden of proof standard of the Jones Act, this was a "close call." Nonetheless, it affirmed the judgment. In doing so, the appellate court improperly relied on *pre-Daubert* law. However, it amended the trial court's judgment only to the extent that the general damages award was duplicative of the jury's award for *future* cure, and it reduced the general damages award by $1,259,764.18. The appellate court did not adequately address or analyze general maritime law in permitting erroneous maintenance and cure awards, such as the improper award of *future*

cure and the unprecedented award of maintenance and cure for an incurable disease, to stand. The ruling of the Fourth Circuit Court of Appeal is attached hereto as App. 1. The citation for the opinion is *Lewis v. Odeco, Inc.*, 07-0497, 12 So.3d 363 (La. App. 4th Cir. 4/8/09). Petitioner thereafter sought supervisory review from the Louisiana Supreme Court. The state's highest court denied writs attached hereto at App. 51. The citation is *Lewis v. Odeco, Inc.*, 09-C-1386, 2009 WL 3601621 (La. 10/10/09).

BASIS FOR JURISDICTION IN THIS COURT

This action was filed in the Civil District Court for the Parish of Orleans, State of Louisiana. The court entered judgment in favor of plaintiff/ respondent. Petitioner herein timely appealed to the Fourth Circuit Court of Appeal, State of Louisiana. The appellate court affirmed the jury's verdict after adjusting damage amounts for *future* cure. Petitioner then timely filed an Application for Supervisory Writs with the Louisiana Supreme Court which was denied. The judgment was entered on October 16, 2009. The ruling of the Louisiana Supreme Court is subject to no further review or correction in any other state tribunal; it is final as an effective determination of the litigation. *See Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 118 S.Ct. 481, 139 L.Ed.2d 433 (1997). As such, it is the final word of a final court, and this Honorable Court has jurisdiction pursuant to 28

U.S.C. § 1257(A). This petition is timely filed under Supreme Court Rule 13(1).

Pursuant to Supreme Court Rule 14(e), Petitioner provides the following information:

(i) The date the judgment or order sought to be reviewed was entered:
October 16, 2009 by the Louisiana Supreme Court

(ii) The date of any order respecting rehearing or granting of an extension of time to file for a writ of certiorari:
Not applicable to this petition

(iii) Rule 12.5 considerations:
Not applicable to this petition

(iv) Statutory provision conferring jurisdiction:
28 U.S.C. § 1257(A)

(v) Rule 29.4 statement:
Not applicable to this petition

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This petition is based on the provisions of general maritime law and federal jurisprudence, specifically including the Jones Act, 46 U.S.C. § 30104 (formerly cited as 46 U.S.C. § 688):

> A seaman injured in the course of employment or, if the seaman dies from the

> injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

STATEMENT OF THE CASE

Plaintiff, Jimmy Lewis, began working as a motorman aboard the *Ocean Spartan* in 1987. At that time, the rig was located in the Gulf of Mexico and owned by the company Odeco. In 1991, the rig was moved to Venezuela. In 1995, a neurologist first diagnosed plaintiff with SIBM, which is similar to Lou Gehrig's disease. Plaintiff and his wife researched SIBM on the internet and found the name of a nationally renowned expert on SIBM, Dr. King Engel. Plaintiff flew to Los Angeles to see Dr. Engel, who examined plaintiff and conducted a number of tests. Dr. Engel confirmed the SIBM diagnosis and advised of the long latency period from the time SIBM is contracted until symptoms first manifest. As numerous neurologists testified at trial, the slowly progressive disease could take 10-20 years to become symptomatic.

Plaintiff voluntarily stopped working in June 1996 to get medical treatment for his slowly progressive muscle weakness. Despite the opinions of Dr. Engel and other neurologists that the cause of the

rare neuromuscular disease is *unknown*, plaintiff thought that he contracted SIBM while working upon the rig in Venezuela. Because he somehow believed that "bad" food and water and hot temperatures were responsible, Mr. Lewis contacted a lawyer to sue his employer. With none of his treating or examining physicians to substantiate his claim as to causation, plaintiff was referred by his attorney to Dr. James P. Carter, a pediatrician and nutritionist. Dr. Carter "opined" that alleged heavy metal exposure aboard the rig in Venezuela *may* have caused plaintiff to contract SIBM, although there was no evidence of any heavy metal exposure aboard the rig and no evidence that any other oilfield worker has ever contracted SIBM. Not surprisingly, Dr. Carter's alleged expert testimony could not withstand a pre-trial *Daubert* challenge as he was neither a neurologist nor toxicologist. The trial court refused to accept him as an expert on SIBM, although his testimony was limited to that of a "treating physician." Plaintiff then presented the deposition testimony of another alleged expert, Dr. Russell Jaffe. Although Dr. Jaffe, who is a pathologist and director of a laboratory in Virginia that sells vitamins, was just as *unqualified* as his friend, Dr. Carter, the trial court inexplicably denied a *Daubert* motion to exclude his testimony. Thus, plaintiff was allowed to present the alleged testimony of a "doctor" who had never examined plaintiff, had never treated anyone with SIBM, and was, until the time he was retained, completely unaware of SIBM. Essentially, Dr. Jaffe's "opinion" did nothing more than mirror the inadmissible testimony of Dr. Carter.

In sharp contrast, defendant's experts were experienced healthcare professionals who were the same expert physicians plaintiff sought out for his diagnosis and treatment and had years of actual experience diagnosing and treating SIBM. All of these experts unqualifiedly testified that there is no known cause of SIBM and that plaintiff's theory had no valid scientific basis. As the record in this matter demonstrates, the scientific evidence presented at trial established that plaintiff could *not* have contracted the disease while in the employ of Petitioner.[1]

The jury erroneously found Petitioner liable under the Jones Act and that plaintiff's illness arose while he was in the service of the *Ocean Spartan*. However, as the Jury Interrogatories demonstrate, the jury did not find that plaintiff's condition resulted from the vessel's unseaworthiness. Despite the fact that SIBM is an *incurable* disease, the jury awarded Mr. Lewis $27,116.00 in maintenance and $1,710,830.60 in cure, as well as $5,409,655.00 in damages for future medical care, income loss, future lost wages and pain and suffering. Petitioner herein filed a post-trial motion properly asserting that: (1) the judgment violated the mandate of *Daubert*; (2) the finding of causation was contrary to the evidence presented at trial; (3) federal law does not provide for an award of maintenance and cure for an *incurable*

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[1] Thus, this is not an issue involving a "credibility call." Rather, it is an issue of positive scientific proof vs. absolutely *no* science at all.

disease; and, (4) the judgment must conform with the stipulation regarding maintenance and the date plaintiff reached maximum medical improvement. Petitioner's Motion for New Trial or Judgment Notwithstanding the Verdict was subsequently denied, and an appeal was timely perfected. On appeal, Petitioner raised a number of specific issues in its Appellant's Brief including the *Daubert* violation, the complete lack of valid scientific evidence, the improper award of maintenance and cure for an *incurable* disease, the fact that general maritime law does not provide for an award of *future* cure, and the trial court's failure to conform the judgment to the evidence and general maritime law by not reducing past cure for amounts paid by others and by not conforming the verdict to reflect a stipulation regarding maintenance.

The Fourth Circuit Court of Appeal acknowledged the lack of scientific evidence to support plaintiff's case. It noted that on the issue of causation, a seaman need only present "slight evidence." Significantly, it stated that "[e]ven under the 'slight evidence' standard, this case is a close call." It admitted that the alleged medical evidence was "underwhelming," to say the least. In effect, the appellate court completely confused the standards of reliability and credibility to determine the admissibility of expert testimony under *Daubert* with the seaman's reduced burden of proof on proximate causation under the Jones Act. This is highlighted by the fact that the court relied upon *Davis v. Odeco*, 18

F.3d 1237 (5th Cir. 1994), a case tried *before* the *Daubert* decision was handed down by this Honorable Court. It is also significant that the appellate court never really addressed the general maritime law issues, much less properly applied the law. It maintained the award for *future* cure without citing any legal authority whatsoever. Similarly, it completely dismissed the collateral source argument by simply stating that Petitioner allegedly did not provide sufficient evidence to support its claim, which is in direct conflict with the record in this matter. In the same vein, the appellate court never even discussed federal law regarding maintenance and cure for an incurable disease. Rather, it just abruptly stated that the jury chose to believe plaintiff's purported expert and his unsupported claim that chelation and hyperbaric chamber treatments *may* "help" plaintiff's *incurable* condition. There was simply no application of general maritime law and no uniformity with the federal jurisprudence in this regard. Accordingly, Petitioner filed an Application for Supervisory Writs with the Louisiana Supreme Court asserting the same issues and assignments of error as in the lower courts. The state Supreme Court denied the writ application without reasons.

ARGUMENT FOR GRANTING THE WRIT

I. This Court should grant the petition because the highest Louisiana state court has erroneously interpreted and applied the Jones Act, conflicting with the decisions of United States Courts of Appeals.

A. *Daubert*, not *Frye*, is the applicable standard governing admissibility under the Jones Act.

In *Daubert*, *supra*, this Court was concerned with determining the admissibility of new techniques as the basis for expert scientific testimony. Formerly, the test for admissibility of expert scientific testimony was based on a "short, citation-free 1928 decision" of the District of Columbia Court of Appeals, *Frye v. U.S.*, 54 App. D.C. 46, 293 F. 1013 (1923). In *Frye*, the rule for admissibility of expert testimony was delineated as requiring "*general acceptance*" of a technique in its respective scientific field *before* the technique is considered admissible. This Court replaced *Frye* with a new standard that requires the trial court to act in a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The reliability of expert testimony is to be ensured by a requirement that there be "a valid scientific connection to the pertinent inquiry as a precondition to admissibility."

In the case at bar, based on the Louisiana Fourth Circuit's *own* ruling, it is clear that the testimony of

Dr. Jaffe was not evaluated under *Daubert*, but rather under the "general acceptance" standard of *Frye*. To get Dr. Carter's unsupported theory before the jury, plaintiff offered the deposition testimony of Dr. Jaffe, an equally unqualified surrogate. However, as the appellate court itself noted, Dr. Jaffe is *not* a neurologist. He had never even seen plaintiff before offering his alleged "opinion" as to causation and treatment. The appellate court further acknowledged that Dr. Jaffe opined that plaintiff was exposed to toxins on the rig based on his *consultation with Dr. Carter* – who the trial court found was not qualified to testify as to causation. The only way such testimony could be deemed admissible would be under the *Frye* "general acceptance" standard which is *no longer the law*. This is underscored by the appellate court's reliance on *Davis v. Odeco*, 18 F.3d 1237 (5th Cir. 1994), a case tried in the federal district court *before* the *Daubert* decision was handed down. The Louisiana Fourth Circuit stated that the *Davis* court allowed recovery under the Jones Act even though the evidence of medical causation was "*an inconclusive hypothesis*," such as the case at bar. Not surprisingly, the *Davis* decision does not even mention the landmark holding in *Daubert* or apply its mandate to that case. As such, the Louisiana courts erroneously relied upon federal case law *pre-dating Daubert* in making its ruling regarding admissibility of expert testimony under the Jones Act.

B. By confusing the lesser burden of proof in a Jones Act case and the separate *Daubert* standard of admissibility of expert testimony, this case directly conflicts with the Second, Fifth, Sixth and Ninth Circuit Courts.

Expert testimony on the issue of causation is necessary in Jones Act cases where a lay juror could not be expected to intuit the causal relationship between the acts in question and the injury. *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 41 (2d Cir. 2004). That expert testimony must satisfy the *Daubert* standards of reliability to be admissible under Rule 702, which is the evidentiary standard applicable to Jones Act cases. *Id.* Under *Daubert* and its progeny, scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case. *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996). Plaintiff, a Jones Act seaman, asserted he was exposed to toxic chemicals, causing his illness. Thus, this case is a toxic tort Jones Act case, requiring plaintiff to establish causation with expert testimony that satisfies the reliability standards imposed by *Daubert*.

Further, in a Jones Act case factually similar to this one, a Louisiana federal district court excluded

under *Daubert*[2] an expert's testimony that benzene in the workplace was the cause of plaintiff's cancer because none of the studies he cited actually isolated benzene as a cause of cancer. *See Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347 (5th Cir. 2007). The Fifth Circuit affirmed, noting a two step process in examining the admissibility of causation evidence in toxic tort cases: first, whether there is admissible *general causation* evidence; and, if so, whether there is admissible *specific causation* evidence. For the expert's testimony to be reliable under *Daubert,* he had to provide a basis for general *and* specific causation. However, none of the studies relied upon by the expert gave an adequate basis for the opinion that the types of chemicals to which plaintiffs were exposed could cause their particular injuries in the general population. Thus, the court ruled that the data he relied upon failed to provide a "relevant" link with the facts at issue, and his opinion was "not based on 'good grounds.'" *See also Seaman v. Seacor Marine, L.L.C.*, 2009 WL 115879 (5th Cir. 4/30/09), in which the Fifth Circuit Court of Appeals recently affirmed the exclusion of purported expert testimony under *Daubert* in another toxic tort case brought under the Jones Act and general maritime law. The *Seaman* court held that the doctor's background information concerning the plaintiff's alleged

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[2] Just as in the instant case, the expert's opinion was not generally accepted and had not been subjected to peer review, published or tested.

exposure to toxic chemicals including drilling mud was "so sadly lacking as to be mere guesswork. . . ." As such, the doctor's testimony did not even come close to establishing either general or specific causation.

The federal Second, Sixth, and Ninth Circuits also interpret the Jones Act as incorporating the *Daubert* evidentiary standards. As the Second Circuit Court of Appeals has noted, although the burden of proof to establish causation under the Jones Act is lower than in a common law tort action, "the standards for determining the reliability and credibility of expert testimony are not altered merely because the burden of proof is relaxed." *Wills v. Amerada Hess Corp.*, 379 F.2d 32, 47 (2d Cir. 2004). In *Wills*, the court specifically noted that the Jones Act incorporates FELA by reference. 379 So.2d at 47. Under both statutes, the plaintiff bears a reduced burden of proof with respect to causation. Accordingly, the courts may refer to the law developed under FELA, as well as that developed under the Jones Act to determine the standards of admissibility. *Id.* (citations omitted). As both the Sixth and Ninth Circuits have observed in the context of FELA claims, "the standard of causation . . . and the standards for admission of expert testimony under the Federal Rules of Evidence are distinct issues and do not affect one another." *Wills*, *supra*, quoting *Claar v. Burlington Northern R. Co.*, 29 F.3d 499, 503 (9th Cir. 1994); *see also Taylor v. Consol. Rail Corp.*, 114 F.3d 1189 (6th Cir. 1997) (unpublished table decision)

(standard for admission of expert testimony in FELA cases is controlled by the Federal Rules of Evidence and *Daubert* and is not affected by the relaxed standard of proof in FELA cases). Moreover, as the Ninth Circuit Court of Appeals specifically stated, the lower standard of causation does *not* "mean that in FELA cases courts must allow expert testimony that in other contexts would be inadmissible." *Claar*, *supra*. Thus, based on these federal appellate cases, there can be no doubt that *Daubert* applies in the context of the Jones Act.

However, here, the Louisiana appellate court erroneously confused the standard regarding burden of proof in a Jones Act case with the standard for admissibility of evidence in this matter, and completely ignored the general and specific causation requirements of a Jones Act toxic tort. Although the standard of proof for a Jones Act plaintiff in no way relaxes or changes the admissibility standard applied to a causation expert under *Daubert*, the appellate court clearly applied the reduced Jones Act causation standard to Dr. Jaffe's expert opinions. For example, while the court recognized that Dr. Jaffe, plaintiff's lone causation expert, lacked the medical credentials, expertise, scientific treatises, and medical theories to support his opinions, even characterizing plaintiff's evidence of medical causation as "underwhelming" and "a close call," the Court cited the reduced Jones Act standard as a basis for affirming the trial court's decision.

However, the court failed to recognize that causation expert testimony that lacks the indicia of reliability under *Daubert* is considered "no evidence" under the Jones Act. *See Seaman, supra* (wherein the court held that since the expert testimony was inadmissible, plaintiff could not prove causation under the Jones Act). Accordingly, a Jones Act plaintiff who relies on experts who, like Jaffe, lack expertise or whose opinions are not grounded in reliable science do not even meet the threshold requirement of causation in a Jones Act case.

II. This petition should be granted because the Louisiana courts ignored general maritime law regarding maintenance and cure, and these federal laws must be properly applied by all state courts to ensure uniformity.

A. There is no maintenance and cure for an *incurable* disease.

It is axiomatic that under the general maritime law, there is no obligation to pay maintenance and cure when a seaman's condition is *incurable*, even though the seaman may be disabled or receive palliative, as distinguished from "curative," medical treatment. *Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949); *Sharp v. Stokes Towing Co.*, 989 F.Supp. 791, 796 (n.2) (N.D. Miss. 1998). Palliative treatments refer to medical treatments which go to the reduction of pain or intensity *without curing* the underlying problem. *Id.* Thus, a

shipowner is liable for maintenance and cure only "until the illness, ailment, disease or condition is cured *or* recognized as being *incurable*." *Stewart v. Waterman Steamship Corp.*, 288 F.Supp. 629, 634 (E.D. La. 1968), citing *The Law of Seamen*, Norris, Vol. 1, § 561, p. 633 and *Fernandez v. United Fruit Co.*, 287 F.2d 447 (5th Cir. 1961). This is the rule even where treatment is required to alleviate pain or to restrain further degeneration. *Stewart, supra* (citations omitted). Seaman injured in the course of their employment are entitled to maintenance and cure benefits only until they reach the point of maximum medical improvement ("MMI"). *Guidry v. The Offshore Drilling Co.*, 2007 WL 519761 (W.D. La. 2/15/07). Maritime law provides that maximum cure is reached when it is probable that further treatment will result in no betterment of the claimant's condition *or* "until the seaman's incapacity is diagnosed as being permanent." *Sharp*, 989 F.Supp. at 796, citing *Vella v. Ford Motor Co.*, 421 U.S. 1, 5, 95 S.Ct. 1381, 1383, 43 L.Ed.2d 682 (1975) and *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996). Accordingly, a vessel owner's obligation imports "responsibility only to finance maximum recovery, *not* to insure a seaman with an *incurable* disease for life" (emphasis added). *Meade v. Skip Fisheries, Inc.*, 385 F.Supp. 725, 727 (Mass. 1974). *See e.g., Whitman v. Miles*, 294 F.Supp.2d 117 (D. Me. 2003), wherein the seaman was diagnosed with multiple sclerosis ("MS"), an *incurable* autoimmune disease; the court held that *slowing or arresting a decline* of the disease, while medically important, is simply *not* the same standard

for maintenance and cure. This decision was affirmed on appeal, whereby the appellate court noted that when a seaman's "condition has stabilized and further progress ended short of a full recovery, the seaman . . . is *no* longer entitled to maintenance and cure." *Whitman v. Miles*, 387 F.3d 68, 72 (1st Cir. 2004); *see also Tern Shipholding Corp. v. Rockhill*, 2006 WL 1788507 (N.D. Fla. 2006), wherein plaintiff had reached the point of maximum medical cure at the time of his *diagnosis* of extensive small cell lung cancer, and the employer was not responsible for maintenance and cure after that point). The law regarding maintenance and cure clearly mandates the same conclusion in this case,[3] and the Louisiana courts erred in failing to properly apply general maritime law.

B. Award inconsistent with determination of when plaintiff reached MMI.

The date when the obligation of maintenance[4] and cure[5] ends is a question of fact to be determined

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[3] The incurable SIBM at issue here is analogous to MS or incurable cancer. There is no dispute that Mr. Lewis' debilitating condition is *permanent* and that the chronic, neuromuscular disease is *incurable*.

[4] Maintenance is the seaman's reasonable expenses of room and board while ashore, until the seaman is fit for duty or until he has reached maximum medical improvement.

[5] Cure is the reasonable medical expenses for "curative" treatment.

by the fact-finder. *Complaint of Robbins*, 575 F.Supp. 584, 587 (D.C. 1983); *see also Reed v. Maritrans Operating Partners, Ltd.*, 1994 WL 463412 (4th Cir. 1994). The law provides that the date a plaintiff reaches maximum medical cure is essential to a determination of the duration of the employer's liability for cure. However, in this case, the trial court, over defendant's objections, refused to include a jury interrogatory asking the jury to determine when plaintiff reached MMI. The parties' stipulation regarding the maintenance rate of $25 per day and the jury's award of $27,116.00 in maintenance results in the conclusion that the jury determined plaintiff reached maximum medical improvement in *June 1999*. The total amount of medical expenses incurred through June 1999 equals $102,003.70. The amount paid by Mrs. Lewis' insurance company through that same period totals $83,691.59. Thus, if any amount of cure is awarded in this matter, the proper amount in accordance with the evidence and general maritime law cited above totals $18,312.11 not $1,259,764.18. This is inconsistent with the award.

C. No obligation to pay cure into the *future*.

Under general maritime law, there is no obligation to pay cure into the future. As a matter of law, there is no obligation to pay for a medical test or treatment before it is performed. *Dominguez v. Marine Transport Management Co.*, 1992 AMC 2863 (E.D. La. 1992); *Bonneau v. Guidance Fishing Corp.*,

919 F.Supp. 46 (D. Ma. 1996). This Court has stated that the award of future cure "should be of a kind and for a period which can be definitely ascertained," *Salem v. United States Lines Co.*, 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962), and should *not* be awarded when the amount of future cure is nothing more than mere speculation. *Rogers v. Eagle Offshore Drilling Services, Inc.*, 764 F.2d 300, 306 (5th Cir. 1985). As indicated hereinabove, the jury awarded plaintiff $1,710,830.60. The Louisiana appellate court held that *only* $451,066.42 of this amount represented past medical expenses introduced in evidence by plaintiff. Consequently, $1,259,764.18 of this award is for *future* medical expenses. Because general maritime law does *not* allow for future medicals based on nothing more than pure speculation, it was not legally authorized. The appellate court cited absolutely no legal authority for its decision. However, since the Louisiana Fourth Circuit found that plaintiff was "entitled" to maintenance and cure, its decision is contrary to the well-settled law and the judgment improperly reflects an unauthorized obligation for it to pay cure well into the *future*.

D. Under general maritime law, cure must be reduced by amount paid by other sources.

In a terse and summary dismissal of Petitioner's meritorious assignment of error, the Louisiana Fourth Circuit refused to reduce the award for cure to reflect amounts paid by other sources including

Medicare/Medicaid and plaintiff's wife's health insurance because, allegedly, there was not sufficient evidence in the record to claim entitlement from collateral sources. However, the record establishes that Medicare/Medicaid and the insurance carriers for Mrs. Darcelle Lewis paid plaintiff's medical expenses in the amount of $400,079.42 (PL. Ex. 15). Plaintiff has *never* contested this fact, and there was no evidence that Mr. Lewis paid *any* of the premiums for the medical insurance that has covered his medical expenses. Mrs. Lewis is not a party to this suit and has no cause of action under the Jones Act or general maritime law, and her insurance carrier did not intervene into this case. Moreover, as the trial court judge specifically noted during pre-trial, it was *plaintiff* who filed a motion in limine regarding collateral source in March 2005. Therefore, plaintiff himself raised the issue of collateral sources and set-off in his own motion, which was argued before, and erroneously ruled upon, by the trial court. He did not ask for past medicals under the Jones Act; as such, the past medicals awarded in this matter were done so under general maritime law. Under general maritime law, an action for maintenance and cure sounds in contract and is considered separate and distinct from any related negligence cause of action. The collateral source rule does *not* apply to a contractual cause of action for maintenance and cure. *In re Matter of Gulf Pride Marine Service, Inc.*, 1997 WL 118394 (E.D. La. 1997).

The general rule is that there is no obligation to provide maintenance and cure if it is furnished by others at no expense to the seaman. *Lauland v. Hugh Eymard Towing Co., Inc.*, (E.D. La. 2000) 2000 WL 533880, citing *Vaughn v. Atkinson*, 369 U.S. 527 (1962). The *Lauland* court positively cited *Moran Towing & Transp. Co. v. Lombas*, 58 F.3d 24 (2d Cir. 1995) for the proposition that when an injured seaman qualifies for Medicare, and the Medicare facilities are available within a reasonable distance from the seaman's residence, and competent physicians are likewise available and will accept Medicare payment, the employer's cure obligation is satisfied. *Id.* Historically, the availability of cost-free cure at the United States Public Health Services marine hospitals satisfied the shipowner's cure obligation. *Blige v. M/V GEECHEE GIRL*, 180 F.Supp.2d 1349 (S.D. Ga. 2001), citing *Moran*, *supra*. "Today, the shipowner's cure obligation is satisfied by Medicare/Medicaid, since 'it is the functional equivalent of the previously available free treatment at Public Heath Services hospitals.'" *Id.* at 1355. As a matter of law, "a vessel owner has no obligation to provide maintenance and cure if it is furnished by others at no expense to the seaman." *Id.* Thus, the shipowner is not liable for medical expenses paid by Medicaid, although it remains liable for out-of-pocket expenses, such as premiums or co-payments. *Id.* at 1355-56. Where a seaman has access to medical treatment free of charge, thus incurring no out-of-pocket expense, shipowners have not been required to pay the seaman additional compensation. *Gosnell v.*

Sea-Land Serv. Inc., 782 F.2d 464, 468 (4th Cir. 1986). In the instant case, the medical bills introduced into evidence by plaintiff himself are clear and unrefuted evidence of defendant's entitlement to a set-off in this matter. Thus, a reduction in the award for cure for payments made by other sources, with no out-of-pocket expense to plaintiff, is mandated under general maritime law.

CONCLUSION

Based on the foregoing, the conflict between the decision of the Louisiana courts in the instant case and prior decisions of United States Courts of Appeals for the Second, Fifth, Sixth and Ninth Circuits regarding the burden of proximate causation under the Jones Act and its effect on the *Daubert* standard for admissibility of expert evidence necessitates the grant of this petition. Moreover, the Louisiana courts' failure to properly apply general maritime law regarding maintenance and cure under well-settled federal principles presents an important issue to be addressed by this Honorable Court. It is respectfully submitted that a ruling from this Court is necessary to ensure the uniform application of federal law by all

state courts to the obligations of maritime employers throughout this nation.

Respectfully submitted,

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JIMMY LEWIS	*	**NO. 2007-CA-0497**
VERSUS	*	**COURT OF APPEAL**
ODECO, INC., MURPHY EXPLORATION AND PRODUCTION COMPANY AND DIAMOND OFFSHORE DRILLING COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

* * * * * * *

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
JIMMY LEWIS	**NO. 2007-CA-1566**
VERSUS	
ODECO, INC., MURPHY EXPLORATION AND PRODUCTION COMPANY AND DIAMOND OFFSHORE DRILLING COMPANY	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-5576, DIVISION "N-8"
HONORABLE ETHEL SIMMS JULIEN, JUDGE

* * *

JUDGE MICHAEL E. KIRBY

* * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge David S. Gorbaty)

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AMENDED, AND AS AMENDED, AFFIRMED

In this consolidated case, the defendant, Diamond Offshore Drilling Incorporated (hereinafter referred to as "Diamond"), appeals three trial court judgments: 1) the December 5, 2006 judgment in favor of plaintiff, Jimmy Lewis, and against Diamond in the amount of $7,147,601.60, plus interest and costs of the proceedings; 2) The February 5, 2007 judgment denying Diamond's motion to annul judgment, motion for new trial or, alternatively, motion for judgment notwithstanding the verdict and motion to conform the judgment with the verdict and/or motion to

amend the judgment; and 3) the October 5, 2007 judgment taxing costs for plaintiff's expert witnesses against Diamond. Plaintiff has answered the appeal regarding the December 5, 2006 and February 5, 2007 judgments.

On March 31, 1997, plaintiff filed a seaman's petition against defendants ODECO, Inc., Murphy Exploration and Production Company, Diamond and their insurers for damages allegedly incurred by plaintiff while employed by defendants as a seaman, mechanic and member of the crew of the jack-up rig, *Ocean Spartan*. Plaintiff alleges that ODECO and/or Murphy Exploration and/or Diamond owned, operated, maintained, and/or controlled the *Ocean Spartan* in the territorial waters of the Country of Venezuela at all pertinent times. Plaintiff's petition states that state court jurisdiction was being invoked pursuant to the Jones Act, the General Maritime Law of the United States of America, the Savings to Suitors Clause, 1228 U.S.C. 1333, et seq., and any applicable general statute and/or federal jurisprudence and law.

In his original petition, plaintiff alleges that in May 1994, while in the service of the vessel, he became seriously ill when he was exposed to and ingested contaminated food and/or water, and contracted the disease sporadic inclusion body myositis ("SIBM"). He alleged that the cause of his illness and damages was the negligent acts and omissions of the master and crew of the *Ocean Spartan,* the unseaworthiness of the vessel, and the failure of defendants to furnish plaintiff with a safe place to work, safe food

and water, appropriate inoculations, an adequate and competent crew, and prompt medical attention. Plaintiff further alleges that as a result of his illness, he has required painful and extensive medical treatment, has suffered severe pain and mental anguish, has become permanently disabled from working and severely handicapped in his other activities, and has lost earning capacity and the enjoyment of life's pleasures. Plaintiff alleges that defendants had, and continue to have, an obligation to provide him with maintenance and cure.

Plaintiff filed a first supplemental and amending petition on May 23, 2000. In that petition, he amended the original petition to allege that his illness was also the result of unprotected exposures to various chemicals. He further alleged that this exposure to toxic chemicals was a proximate and legal cause of his illness and damages.

Plaintiff filed a second supplemental and amending petition on May 12, 2004. In that petition, plaintiff alleged that while working for defendants as a member of the crew of the *Ocean Spartan,* he was forced to work eighteen hour days in 100 plus degree temperatures and high humidity, during which he was continually exposed to heavy metals, poisons and toxic chemicals, including but not limited to arsenic, mercury, lead and antimony, as well as contaminated and impure food and water. As a result of these working conditions, plaintiff alleged that his system was debilitated and his resistance weakened, making him more susceptible to injury, illness and disease.

He further alleged that the damage to his body and nervous system has resulted in his being effectively paralyzed and confined to a wheelchair. In addition to the other allegations made against defendants in the original and first supplemental and amending petitions, plaintiff also alleged that defendants were arbitrary and capricious in their refusal to provide maintenance and cure. He further alleged that defendants' continued failure and refusal to produce any information that would assist plaintiff's diagnosis contributed to his damages.

Upon joint motion of plaintiff and defendants ODECO, Inc. and Murphy Exploration and Production Co., the trial court dismissed plaintiff's claims against those two defendants by order dated October 11, 2004. Plaintiff did not release Diamond and specifically reserved his rights against that defendant. A jury trial was held in this matter in November 2006 between plaintiff and the only remaining defendant, Diamond. The jury interrogatories show that the jury found Diamond negligent under the Jones Act, and that the negligence was a cause in the development of plaintiff's condition. The jury also found that the vessel, *Ocean Spartan,* was unseaworthy, but that the unseaworthiness was not a proximate cause of plaintiff's condition. The jury found that plaintiff's condition arose while he was in the service of the *Ocean Spartan,* and that he was entitled to damages in the amount of $5,409,655.00, in addition to maintenance in the amount of $27,116.00 and cure in the amount of $1,710,830.60. The jury found that plaintiff was

not damaged as a result of Diamond's unreasonable failure to pay him maintenance and cure, and awarded plaintiff no damages for the withholding of maintenance and cure.

On December 5, 2006, the trial court rendered judgment in favor of plaintiff, Jimmy Lewis, and against Diamond in the amount of $7,147,601.60, plus interest and costs of the proceedings. Diamond filed a motion to annul the judgment and a motion for new trial or, in the alternative, judgment notwithstanding the verdict and motion to conform the judgment to the verdict and/or motion to amend the judgment and to set expert fees. On February 5, 2007, the trial court rendered judgment denying all of Diamond's motions except for the motion to set expert fees, which the trial court took under advisement. The trial court rendered judgment on the issue of expert fees on October 5, 2007. In that judgment, the trial court taxed costs for plaintiff's expert witnesses against Diamond. Diamond appealed, and plaintiff answered the appeal as to the December 5, 2006 and February 5, 2007 judgments.

Before addressing the numerous assignments of error raised by Diamond, we note that plaintiff filed an answer to the appeal alleging additional errors on the part of the trial court. However, these assignments of error were not briefed, and are considered abandoned. *See* Uniform Rules – Courts of Appeal, Rule 2-12.4; *Folse v. Gulf Tran, Inc.*, 2003-0758 (La.App. 1 Cir. 2/23/04), 873 So.2d 718.

In Diamond's first assignment of error, it argues that the trial court violated Rule 9.5 of the Rules for Civil Proceedings in District Courts. Rule 9.5 states:

> All judgments, orders, and rulings requiring the court's signature must either be presented to the judge for signature when rendered or, if presented later, contain the typewritten name of the judge who rendered the judgment, order or ruling.
>
> If presented later, the responsible attorney or the unrepresented party must circulate the proposed judgment, order or ruling to counsel for all parties and to unrepresented parties and allow at least three working days for comment before presentation to the court. When submitted, the proposed judgment, order or ruling must be accompanied by a certificate regarding the date or mailing, hand delivery or other method of delivery of the document to other counsel of record and to unrepresented parties, and stating whether any opposition was received.
>
> This rule does not apply to default judgments.

Diamond asserts that the trial court instructed plaintiff's counsel to prepare and submit a judgment following trial. Diamond further alleges that it did not receive the proposed judgment prior to the court's signing of the judgment, and the judgment was not accompanied by a certificate reflecting the date of mailing or method of delivery of the same. In

response, plaintiff's counsel does not dispute these assertions by defense counsel. He states that he hand-delivered the proposed judgment to the judge's office before filing it because the judge "was leaving town for a week and action was necessary to place the judgment on the record." Plaintiff's counsel further states that Diamond made no comment on the judgment when it filed its motion to annul based on Rule 9.5.

Plaintiff's counsel's response does not dispute or even address the fact that Diamond was not given an opportunity to comment on the proposed judgment before it was presented to the trial court for signature. Plaintiff's counsel's [sic] does not offer an acceptable explanation for his actions, and we find his failure to comply with Rule 9.5 troubling. Furthermore, we find error on the part of the trial court in signing a judgment without certification that the provisions of Rule 9.5 had been followed. However, in these particular circumstances, we find this error to be harmless in that the non-compliance with Rule 9.5 did not affect the result in this case because the trial court simply adopted the jury's verdict in its judgment.

Diamond next argues that the trial court erred in admitting the testimony of plaintiff's medical experts following a *Daubert* hearing. Prior to trial, Diamond filed motions in limine to exclude the testimony of plaintiff's purported experts, Dr. James Carter and Dr. Russell Jaffe. In these motions, Diamond argued that neither Dr. Carter nor Dr. Jaffe is qualified by

education or experience to offer expert testimony in this matter. Thus, Diamond argued that the testimony of Dr. Carter and Dr. Jaffe is not admissible under Louisiana Code of Evidence article 702, and lacks the indicia of relevance and evidentiary reliability required under *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *State v. Foret,* 628 So.2d 1116 (La.1993), and should be excluded as a matter of law.

At the beginning of trial, the trial court ruled on Diamond's motions in limine to exclude the testimony of Drs. Carter and Jaffe. The Court denied Diamond's motion in limine to exclude the testimony of Dr. Jaffe, and Diamond applied for emergency supervisory writs with this Court as to Dr. Jaffe only. On November 14, 2006, this Court, in 2006-C-1485, denied Diamond's writ application, finding no abuse of the trial court's discretion. With regard to the motion in limine to exclude the testimony of Dr. Carter, the trial court ruled it was not accepting Dr. Carter as an expert in the causes of SIBM, but that Dr. Carter would be allowed to testify as to his treatment of plaintiff. Prior to ruling, the trial court referred to an earlier hearing on Diamond's *Daubert* motions, but the appeal record does not include a transcript of that proceeding.

On appeal, Diamond argues that the trial court erred in its rulings on the motions in limine to

exclude the testimony of Drs. Carter and Jaffe.[1] As stated above, this Court denied the motion to exclude the testimony of Dr. Jaffe, finding that the trial court did not abuse its discretion. Plaintiff argues that this ruling is now the law of the case and should not be reconsidered. In *Delta Chemical Corp., v. Lynch,* 2007-0431, p. 8 (La.App. 4 Cir. 2/27/08), 979 So.2d 579, 585, this Court set forth the law regarding the law of the case doctrine as follows:

> In *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.,* 260 La. 325, 330, 256 So.2d 105, 107 (La.1972), the Supreme Court stated:
>
> With regard to an appellate court, the "law of the case" refers to a policy by which the court will not, on a subsequent appeal, reconsider prior rulings in the same case. This policy applies only against those who were parties to the case when the former appellate decision was rendered and who thus had their day in court. Among reasons assigned for application of the policy are: the avoidance of indefinite relitigation of the same issue; the desirability of consistency of the result in the same litigation; and the

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[1] Diamond also alleged as error the trial court's failure to exclude the testimony of Dr. Paul Harch and Dr. John Olsen, but did not brief the objection to the testimony of these two witnesses. Therefore, Diamond's arguments as to the failure to exclude the testimony of Drs. Harch and Olsen are abandoned. *See* Uniform Rules-Courts of Appeal, Rule 2-12.4; *Folse v. Gulf Tran, Inc.,* 2003-0758 (La.App. 1 Cir. 2/23/04), 873 So.2d 718.

> efficiency, and the essential fairness to both parties, of affording a single opportunity for the argument and decision of the matter at issue.
>
> Nevertheless, the law-of-the-case principle is applied merely as a discretionary guide: Argument is barred where there is merely doubt as to the correctness of the former ruling, but not in cases of palpable former error or so mechanically as to accomplish manifest injustice. Further, the law-of-the-case principle is not applied so as to prevent a higher court from examining the correctness of the ruling of the previous court.
>
> *See also, Zatarain v. WDSU-Television, Inc.*, 95-2600, p. 10 (La.App. 4 Cir. 4/24/96), 673 So.2d 1181, 1186 ("This court generally applies the 'law of the case' doctrine when reviewing an issue decided on supervisory writs as part of the appeal of the case following a trial on the merits, except when it finds either that the previous decision is based on palpable error or that manifest injustice would result.").

Both plaintiff and Diamond were parties to this case when the issue of Dr. Jaffe's testimony was decided on supervisory writs. We do not find that the previous decision was based on palpable error or that manifest injustice would result if the law of the case doctrine is applied. Therefore, we find that the law of the case doctrine applies as to this Court's decision that the

trial court did not abuse its discretion in denying the motion in limine to exclude the testimony of Dr. Jaffe.

With regard to the trial court ruling regarding Dr. Carter's testimony, we find no abuse of discretion in the trial court's decision to limit Dr. Carter's testimony to his treatment of plaintiff. The trial court ruled that Dr. Carter could not testify as to the cause of SIBM, and Dr. Carter confirmed his lack of knowledge as to the cause of SIBM in his trial testimony. We do not find that the trial court abused its discretion in its ruling as to the areas to which Dr. Carter could and could not testify.

This assignment of error has no merit.

Diamond next argues that there is no evidence of Jones Act negligence in this case, that plaintiff did not carry his burden of proving that his SIBM was caused by exposure to heavy metals or his employment with Diamond, and that the finding of causation was contrary to the evidence. It is undisputed that plaintiff has SIBM. What is disputed is whether or not plaintiff contracted this disease and other illnesses during his employment with Diamond.

In *George v. Delta Queen Steamboat Co.*, 2001-1902, pp. 10-11 (La.App. 4 Cir. 9/10/03), 854 So.2d 476, 482-483, this Court summarized the legal standard for determining negligence under the Jones Act as follows:

> Federal jurisprudence in 1997 clarified that seamen in Jones Act negligence cases

are bound to the standard of ordinary prudence, not to a lesser standard of care; *i.e.*, according to the court, Jones Act seamen are required to act as reasonable seamen under the circumstances. Similarly, Jones Act employers are not held to a higher standard of care than ordinary negligence, but are required to act as reasonable employers under the circumstances. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir.1997). Inconsistent federal jurisprudence was overruled by that decision.

A year later, the Louisiana Supreme Court adopted the above standard concerning Jones Act negligence enunciated in *Gautreaux* and stated:

The duty of care owed by an employer under the Jones Act is that of ordinary prudence, namely the duty to take reasonable care under the circumstances. The seaman bears the evidentiary burden of proving that a breach of the duty owed by the employer was a cause of his injuries. However, a seaman need only present "slight evidence" that his employer's negligence caused his injuries in order to reach the jury or to be sustained upon appellate review. The employer can introduce evidence of the seaman's own negligence to reduce damages through application of pure comparative fault principles. Like his employer, the seaman must meet the standard of ordinary prudence by acting as a reasonable seaman would act under the same circumstances.

> *Foster v. Destin Trading Corp,* 95-226 at pp. 3-4 (La.5/30/97), 700 So.2d 199, 208 (on rehearing) (citations omitted).
>
> Additionally, the court in the same case reiterated the standard for unseaworthiness:
>
> > The owner of a vessel has a duty to furnish a seaworthy vessel. This duty is absolute and nondelegable. It extends to a defective condition of the ship, its equipment, or appurtenances. A ship's equipment and appurtenances include most objects and things on or attached to the vessel regardless of whether the item belongs to the ship or is brought aboard by a third party.
>
> *Id.* at p. 5-6, 700 So.2d at 209 (citations omitted).

Diamond purchased the *Ocean Spartan* from ODECO in January 1992. At trial, the plaintiff testified that he worked as a motorman on the *Ocean Spartan* in the Gulf of Mexico starting in 1988, and became a mechanic in 1992 or 1993. He worked on this vessel when it was moved to Venezuela in February 1991, and worked on the vessel in Venezuela for three years. He was diagnosed with SIBM in early 1996. When the vessel went to Venezuela, plaintiff worked 28 days on and 28 days off. Each time he would arrive back on the rig, he began to have diarrhea, which would continue until he went home and then stop three to four days after he arrived home.

Plaintiff testified that the drinking water generated from the Alpha Laval water system tasted bad. He said Lake Maracaibo, where the vessel was located, was polluted. Plaintiff testified that some of the drinking water on the vessel was delivered by barge, but drinking water was also generated from an Alpha Laval "water maker." Plaintiff stated that water from the lake was used in the water system. He took samples of lake water to be tested, but admitted that he never saw any test results.

He said that at times the crew had no other water source to drink other than water from the water system. He said the temperature on the decks ranged from 103 to 110 degrees except for the days that it rained. He said that once he became a mechanic, he tried to correct the problems with the water system. Plaintiff also testified that his job involved working in and around the mud pit room. He said that "mud" is the term used for drilling fluid. He said the temperature in the mud pit room could get as high as 160 degrees. Plaintiff said he worked on the *Ocean Spartan* when it returned from Venezuela until May 1996 when his doctor advised him to quit working because of his worsening condition. He began to use a wheelchair in the early part of 1999.

On cross-examination, plaintiff testified that he did not know he was ill in 1991, but that he started to "tire out" in 1991. He would not admit to telling several doctors that his illness began in 1991. He stated that his doctors told him that his diarrhea-related issues were not related to his SIBM. While on

the *Ocean Spartan* in Venezuela, he never heard anyone say that the water was not adequate for consumption. When asked about his allegation in his original petition that ODECO and Murphy Oil were responsible for his illness, his response was that he did not know at that time whether the responsible party was ODECO, Murphy Oil or the new company named Diamond Offshore.

Dennis Bailey, who helped create safety training manuals and safe drilling operations manuals for Diamond, testified that he inspected the *Ocean Spartan* when it was in Venezuela on only one occasion, and that was in 1991. He stated that the safety inspections conducted by Diamond did not include inspections of the water system. He said a rig mechanic is not supposed to mix chemicals.

Billy Plaisance, a driller on the *Ocean Spartan* in 1992, testified that oil-based drilling mud would spill onto the drilling floor during the course of operations. He said he had no knowledge that oil-based muds were washed overboard, but he knew that water-based muds, including some with diesel in them, were washed overboard into the lake.

James Chatham, an assistant driller on the *Ocean Spartan,* also testified that water-based mud was dumped in the lake, regardless of whether or not it contained diesel. Mr. Chatham testified that Soltex was one of the products used on the *Ocean Spartan* in Venezuela. He also testified that it was common knowledge that Lake Maracaibo was polluted, and

that he could see that it was polluted. He stated that he had diarrhea when in Venezuela, but it would stop three to four days after he returned home.

Terry Petty, who was accepted as an expert in the operation of drilling rigs and petroleum engineering, testified that he conducted an investigation of the Alpha Laval water system at plaintiff's request. He said the water system is a distillation system that removes salt and some pollutants from raw water. He stated that the manufacturer of the system gave a specific warning that fresh water must not be produced from polluted water because such water can be unsuitable for human consumption.

Wade Reason, the Diamond rig superintendent who traveled with the *Ocean Spartan* to Venezuela, testified that lake water was never pumped directly into the potable water tanks when he was in Venezuela. But Mr. Reason testified on cross-examination that he worked 28 days on and 28 days off so he could only answer that question as to the time he was aboard the vessel. His understanding was that Lake Maracaibo was polluted. As to the disposal of oil-based mud, Mr. Reason testified that most of it was placed on the barge and the rest of it was washed and dumped overboard. He said that neither motormen nor mechanics mix chemicals or handle the drilling mud additives.

The defense also presented the testimony of Calvin Barnhill, who was recognized as an expert in petroleum engineering. He was hired as a consultant

by Diamond for this case, and was asked to review drilling reports and other information for the time period Diamond owned the *Ocean Spartan*. According to those reports, he said it "looks like" there were two wells that used oil-based mud, and that plaintiff was on the rig for 20 days while one of those wells was drilled in 1992 and for 28 days while the other well was drilled in 1993. He said he obtained this information from reports kept by Diamond. He said the drilling operations conducted in Lake Maracaibo, Venezuela were normal, routine drilling operations.

Mr. Barnhill testified that he found nothing out of the ordinary in the way drilling muds were used while the *Ocean Spartan* was in Venezuela. He stated that he is familiar with the drilling additive, Soltex, and he is not aware of any hazards regarding heavy metal exposure in the use of that product. He stated that the muds used onboard the *Ocean Spartan* were classified as non-hazardous oil field materials. On cross-examination, Mr. Barnhill stated that the mixing and treatment of certain chemicals in drilling fluids can be considered pollutants, depending on the levels and the methods of disposal. He acknowledged that he has not measured the amounts of chemicals in the oil fluids and drilling waste.

Joseph Wood, an expert in industrial hygiene, testified that the safety programs in place on the *Ocean Spartan* while in Venezuela were adequate. He said Soltex has been used in the drilling industry for a long time. He said Soltex contains no hazardous warnings for heavy metals. He did not know all of the

components contained in Soltex. He said he had no way of knowing if heavy metals were in a drilling mud unless he tested it, and he said he has not tested drilling muds.

Felix Nowell, worked as a motorman on the *Ocean Spartan* when it moved to Venezuela. He said as a motorman, he did not have to mix chemicals in the mud pit room. He said one of his responsibilities was taking care of the water maker. He said he worked on the Alpha Laval water system. When it was first installed, he sent samples of the water in the system to be tested, and no one ever indicated to him that the water was unsafe for consumption. He said that water used in the water system came from "deep wells," which he described as a saltwater tower. He said he drank the water from the system and had no problems. He had no knowledge as to whether lake water flowed directly into the potable water tank. On cross-examination, Mr. Nowell said he was only on the *Ocean Spartan* in Venezuela for a short while, leaving in July 1991 to work on another rig.

The following is a summary of the expert medical testimony presented at trial.

Dr. James Carter

Dr. James Carter, a pediatrician and nutritionist, was accepted by the trial court as an expert in the areas of tropical medicine, heavy metal and its effects on the body, public health and nutrition, and integrated medicine. As stated above, the trial court did

not accept him as an expert in the causes of SIBM. The court only allowed Dr. Carter to testify as to his treatment of plaintiff.

Dr. Carter testified that he first saw plaintiff on November 11, 2002, and as of the trial date, was still treating plaintiff on a continuing basis. Plaintiff's medical records showed that he had been diagnosed with SIBM and malignant hypertension. Plaintiff was referred to Dr. Carter to check for heavy metal toxicity. Dr. Carter noted that plaintiff had been checked for gastrointestinal distress, specifically diarrhea, which cleared up each time he left Venezuela and would recur each time he returned to Venezuela.

Dr. Carter tested plaintiff for heavy metals, and found metals that are present in a common additive to drilling fluid called Soltex. Those metals include antimony, arsenic, cadmium, cobalt, lead, mercury, nickel and zinc. Plaintiff had high levels of each of these metals in his system. Dr. Carter's opinion is that it is more likely than not that the concentration of heavy metals came from drilling fluids. He treated plaintiff with a chelating medication called EDTA, which he described as a substance that goes into the body, grabs hold of metals and is excreted through the kidneys along with the metals attached to it. Dr. Carter said plaintiff showed progress with chelation therapy in that his mercury levels have fallen. His opinion is that plaintiff needs to continue chelation therapy in order to eliminate all of the metals from his system. His opinion is that plaintiff needs chelation therapy in combination with hyperbaric

oxygen treatments he was receiving from Dr. Paul Harch.

Dr. Carter admitted that he does not know the cause of SIBM. But after reviewing plaintiff's medical records, he stated that there is a "suggestion" that he also has oxidative toxic stress at the cellular level, and that this can be caused by metals. When asked if it is his opinion that plaintiff's exposure to heavy metals in Venezuela caused his cells to not be able to do the normal things that they would otherwise be able to do, Dr. Carter responded:

> Well, I think the exposure to metals again is the flagship that he may have been exposed to other environmental chemicals as well. But the exposure to metals is something we can measure. It does explain in part this gastrointestinal distress and how it comes and goes and that it is not an infectious illness that stops at the border, as I said earlier. It does explain the lead associated with hypertension. There's just no proof that those metals caused this Inclusion Body Myositis or adult muscular dystrophy. It's a case of guilt by association.

However, Dr. Carter then stated that environmental, chemical and heavy metal contamination that plaintiff was exposed to in Venezuela while working for Diamond is the most likely cause of all of plaintiff's illnesses.

On cross-examination, Dr. Carter testified that he got involved in plaintiff's treatment five years

after this lawsuit was filed. He admitted he had not been to the rig where plaintiff worked and has no documentation as to what plaintiff's metal levels were when he was working in Venezuela. He also stated that plaintiff's mercury levels were normal in 1998. Dr. Carter testified that "in all likelihood" plaintiff got mercury in his system from working on the rig because mercury was in the drilling fluid additive used on the rig. When asked what his source was for his conclusion that mercury was in the drilling fluid additive, he responded that his information was from "several articles." He confirmed his earlier opinion stated in his deposition that Dr. King Engel is the world-renowned expert in SIBM, and that he would defer to his opinions on that disease. But when asked if he would defer to Dr. Engel if Dr. Engel disagreed with his opinion about metals in drilling fluid causing plaintiff's illnesses, Dr. Carter said he would not agree with that because he was dealing with the specifics of plaintiff's case, while Dr. Engel's opinions was of a more general nature.

Dr. Paul Harch

Dr. Paul Harch was accepted as an expert in the fields of emergency medicine and hyperbaric treatment. Dr. Harch testified that plaintiff was referred to him for treatment by Dr. James Carter in early 2005. Dr. Harch first evaluated plaintiff on March 29, 2005. He treated plaintiff with hyperbaric oxygen therapy in an attempt to improve his SIBM. Plaintiff received forty treatments, and showed improvement.

Plaintiff was videotaped before and after the treatments, and these videotapes were introduced into evidence. Dr. Harch's opinion is that the hyperbaric treatments helped plaintiff, and will continue to help him if he has more of these treatments. Dr. Harch admitted that he did not know of any other case where hyperbaric oxygen therapy was used for SIBM.

On cross-examination, Dr. Harch stated that plaintiff was the first patient he had ever seen with this disease. He also testified that plaintiff reported to him that his symptoms first appeared in late 1991.

Dr. John Olsen

Dr. John Olsen, an expert in the field of neurology, testified that he first saw plaintiff on October 5, 2006. On that visit, Dr. Olsen found that plaintiff had significant long-term damage from a myopathic process that looks like SIBM, but he noted that plaintiff's case is atypical. He stated that there is no well-defined etiology for this disease. Dr. Olsen said that specific treatment for SIBM is not available, but symptomatic treatment is available. He noted that the videotape recordings made while plaintiff received hyperbaric oxygen treatment from Dr. Harch showed that plaintiff had some response to this treatment but the improvement is only transient. He said he does not expect plaintiff to be cured of SIBM. Dr. Olsen said that cases of this disease are very rare, and he was unable to say what caused plaintiff's SIBM. When asked if plaintiff's weakness and

gastrointestinal symptoms could have been caused when he was working off the coast of Venezuela, Dr. Olsen stated:

> I think he was exposed to something, you know; and I think it was probably down there. Okay? That's what I think. Could I be wrong? Yes, I could be wrong.

On cross-examination, Dr. Olsen admitted that before his treatment of plaintiff, he was not sure he had ever seen SIBM. He acknowledged that SIBM is a progressive disease, and by the time a person recognizes the symptoms, they have usually had the disease "for a time." Plaintiff related to Dr. Olsen that he became symptomatic in late 1991. Dr. Olsen stated that no one knows what triggers SIBM.

Dr. Russell Jaffe

The deposition of Dr. Russell Jaffe was read into the record. The trial court recognized Dr. Jaffe as an expert in the fields of internal medicine, biochemistry, pathology, chemical immunology and clinical nutrition. Dr. Jaffe testified that he received plaintiff's medical records from Dr. Carter. He stated that he is the director of a laboratory in which he is the majority owner, but he does not have a medical practice. He has never seen plaintiff.

Based on his review of plaintiff's records and consultation with Dr. Carter, Dr. Jaffe stated his opinion that plaintiff was exposed to toxicants prior to working on the *Ocean Spartan*, but this prior

exposure was not the cause of plaintiff's medical condition. His opinion was that the combination of lack of nutrients and the presence of bad toxicants in the working conditions on the *Ocean Spartan* exposed plaintiff to a heat shock stress that depressed his body's ability to neutralize the bad toxic minerals and/or pesticides to which he was exposed. He suggested that hyperbaric oxygen therapy in combination with antioxidant therapy would be appropriate treatment for plaintiff's condition.

Dr. Jaffe stated that plaintiff's case is the first time he has ever been consulted regarding SIBM. He said that patients with SIBM are customarily treated by neurologists, and he is not a neurologist. When asked if he has found any credible scientific studies that relate SIBM to any particular cause, his response was, "[t]here are hypotheses." He further stated that he does not believe anyone in the world asserts that they know the cause of SIBM. He stated that he is not aware of any credible scientific studies that established that heavy metal exposure causes SIBM. Dr. Jaffe qualified that statement by saying that he has found strong evidence that exposure to certain toxic metals at the level plaintiff was allegedly exposed to, at a time when he was distressed because of heat shock exposure, would have reduced his innate protective antitoxic mineral production and made him susceptible to toxic metal accumulation. He further stated that toxic metal accumulation inside the mitochondria (described as independent organisms living

inside cells) causes death to the mitochondria, and a dead mitochondria becomes an inclusion body.

Dr. Jaffe testified that the muscle weakness reported by plaintiff in 1991 may or may not have been related to his SIBM. Based on the medical histories he was provided, he stated that plaintiff began experiencing symptoms of SIBM in 1992. He could not say with a reasonable degree of medical certainty that plaintiff had SIBM before his diagnosis in 1994 or 1995. He said the latency period for SIBM is usually long, and can be anywhere from a few months to decades. However, he said plaintiff's case is atypical because the onset of the disease was at age 35, which is a young age for onset, and was fairly aggressive. Dr. Jaffe stated that he has not been involved with any studies regarding the treatment of patients with SIBM. He admitted that one hypothesis he considered was that plaintiff's illness may have occurred over 20 years. He said his first hypothesis was that plaintiff's illness was a slowly progressive condition that finally came to attention in 1994 or 1995. He said he later excluded this hypothesis after learning that plaintiff's condition progressed rapidly between 1991 and 1995. He said the rapid progression of plaintiff's illness caused him to conclude that his exposure to toxic chemicals while working on the *Ocean Spartan* was "a sufficient predisposing cause" of his illness.

On the subject of heat shock, Dr. Jaffe defined this condition as exposure to temperatures in excess of 140 degrees for a significant period of times,

typically minutes. He said it was his understanding that plaintiff was exposed to temperatures in excess of 140 degrees while working in the mud room or pit on the *Ocean Spartan*. However, he admitted he had no personal knowledge that plaintiff was working in these conditions. Rather, he received this information from Dr. Carter. Dr. Jaffe said the relevance of heat shock to this case is that if he were exposed to this type of hot environment, it would reduce his body's ability to produce protective antitoxic molecules and would make him much more at risk of accumulation and toxic effects from the same toxicants that he might have been exposed to before at low levels. He also stated that it was his understanding that plaintiff was exposed to toxic metals and persisting organic dilutants such as pesticides while working on the *Ocean Spartan*. He acknowledged that plaintiff's history showed that he also used pesticides at his home.

He said his conclusion that heat shock, followed by chronic low level exposure to toxic metals and pesticides, is part of the cause of SIBM is a hypothesis that has not been confirmed. He then stated that his opinion is that plaintiff would not have acquired SIBM if he had not been employed on the *Ocean Spartan* off the coast of Venezuela. Dr. Jaffe confirmed that there is no known cure for SIBM, and that he has seen no evidence that heat shock alone causes SIBM. It is Dr. Jaffe's opinion that Dr. Carter's differential diagnosis, treatment plan and opinion as to the causes of plaintiff's illness are correct. He

stated that he was relying on the accuracy of information given to him by Dr. Carter in reaching his medical opinion in this case.

Dr. Jaffe stated that he believes plaintiff's condition has improved as a result of a combination of hyperbaric oxygen therapy treatments, treatments provided by Dr. Carter to rid plaintiff's body of toxins and dietary management. His opinion is that plaintiff will continue to improve if this course of treatment is followed. Dr. Jaffe's opinion is that if this course of treatment had been started when plaintiff was first diagnosed with SIBM, his physical condition would be considerably better, and he would have less disability. He said that his opinion is that plaintiff would not be wheelchair-bound if the appropriate medical therapy had begun closer to the time of his diagnosis. Dr. Jaffe stated that it is his considered medical opinion that the conditions under which plaintiff worked on the *Ocean Spartan* contributed to the cause of his current medical problem. However, he later admitted that he is not aware of any credible scientific evidence that SIBM is caused by heavy metal exposure or is effectively treated by hyperbaric treatment or removal of toxic metals.

Dr. John England

Dr. John England, recognized by the trial court as an expert in the field of neurology, testified by videotaped deposition. Dr. England has a subspecialty

in neuromuscular disease, which encompasses treatment of individuals with SIBM. He stated that he evaluated plaintiff in August 1999. Dr. England described SIBM as being slowly progressive in most cases. He testified that SIBM has no known causes, only hypotheses and theories. He also testified that SIBM has no known cure. He said that by the time most patients have been diagnosed with SIBM, they have most likely had the disease for several years. Plaintiff's SIBM was diagnosed in 1995 by muscle biopsy, but plaintiff's medical history indicated that the onset of muscle weakness was in 1991. Dr. England stated that when a patient with SIBM first recognizes muscle weakness, then the disease has been present in the individual for a period of time, typically four to five years.

During the time period when Dr. England saw plaintiff, plaintiff's condition continuously deteriorated with no improvement despite treatments he was receiving from other physicians. He testified that there is no scientific or medical evidence to suggest that being a mechanic on an offshore drilling rig would have anything to do with the development of SIBM. He said there is no evidence that SIBM is related to any known environmental factor, occupational or otherwise. Dr. England stated that there is no credible scientific evidence that chelation therapy or hyperbaric chamber treatment helps SIBM. He further stated that he is not aware of any scientific medical studies that conclude that exposure to mercury causes SIBM. He said while heavy metal

intoxication can cause problems in the nervous system, there are no reports of heavy metal intoxication causing direct effects on muscle. He further stated that mercury, in and of itself, does not usually cause nerve or muscle problems. He said the current scientific conclusion is there are no effective treatments for SIBM.

Dr. John A. Sumner

Dr. John Sumner was accepted by the trial court as an expert in the field of neurology. He testified that he has a subspecialty in neuromuscular disease, including the disease of SIBM. He said he has diagnosed and treated patients with SIBM. Dr. Sumner examined plaintiff one time after he was already diagnosed with this disease. He said the cause of SIBM is unknown. He stated that plaintiff developed SIBM at age 35, which is early onset for this disease, but his SIBM was typical other than for the factor of early onset. Plaintiff told Dr. Sumner that he recognized his symptoms in 1991. Dr. Sumner testified that SIBM is usually a slowly progressive disease, and a person usually has the disease for a period of time before the symptoms are recognized. His opinion, based on his research, is that by the time a person with SIBM becomes wheelchair-bound, he or she has had the disease for a minimum of ten years, and typically many more years than that. Plaintiff first recognized muscle weakness in 1991 and starting using a wheelchair in 1996. Dr. Sumner's

conclusion is that plaintiff's SIBM had been present since at least 1986.

Dr. Sumner stated that there is no known cure or demonstrated effective treatment for SIBM, and no scientific evidence that chelation therapy or hyperbaric oxygen treatment are effective treatments or cures for this disease. He also stated that there is no scientific evidence that heavy metal exposure causes SIBM. Dr. Sumner reviewed plaintiff's medical records and concluded that plaintiff did not have symptoms of heavy metal poisoning.

Dr. King Engel

Dr. King Engel, an expert in neurology and neuromuscular diseases, testified by videotaped deposition. He is the author of a book entitled, "Inclusion – Body Myositis and Myopathies," published in 1998 by Cambridge University Press. He stated that the causes of SIBM are unknown, and there is no known cure. Dr. Engel first saw plaintiff in June 1998. Plaintiff told him that he had progressive weakness in all four limbs since late 1992, and his weakness has worsened to the point where he has difficulty swallowing solid food. Dr. Engel performed a muscle biopsy, and confirmed plaintiff's diagnosis of SIBM. Plaintiff reported to Dr. Engel that he had received four courses of intravenous immunoglobulin starting in April 1996. Dr. Engel recommended two kinds of oral treatment, Carnitine and Co-Q-10, along with prednisone. He explained that Carnitine and Co-Q-10

are normal substances in our bodies, and are especially useful to mitochondrial function. He recommended these substances, which are available at health food stores without a prescription, because in SIBM patients, the mitochondria are abnormal. He said these medications can be helpful in assisting in symptomatic control.

Dr. Engel said it is fairly common for SIBM patients to have difficulty swallowing, but gastrointestinal problems such as diarrhea and upset stomach are not symptoms commonly seen in SIBM patients. He stated that his hypothesis regarding plaintiff's case is the existence of a virus in his system. He said his hypothesis was the probable but unproven cause of plaintiff's SIBM because no viral agent has been found in plaintiff's case.

Dr. William George

Dr. William George was accepted as an expert in the area of pharmacology and toxicology. He is not a physician, but earned a doctorate degree in pharmacology with a specialization is toxicology. He reviewed laboratory reports of tests performed on plaintiff on several occasions after his employment with Diamond ended, and said that the levels of heavy metals in plaintiff's system were always within normal limits. His opinion, based on his research of toxicology literature, is that there is no evidence that SIBM is caused by metals.

In *Domonter v. C.F. Bean Corporation,* 99-1204, pp. 11-12 (La.App. 5 Cir. 4/25/00), 761 So.2d 629, 637, the standard of review for Jones Act claims of negligence and unseaworthiness was summarized as follows:

> The appropriate standard of review in a Jones Act and unseaworthiness claim is the manifest error or the clearly wrong standard. *Foster v. Destin Trading Corp.,* on rehearing, 96-0803 (La.5/30/97), 700 So.2d 199, 202. Where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Brown v. Seimers,* 98-694 (La.App. 5th Cir.1/13/99), 726 So.2d 1018, 1021, writ denied, 99-0430 (La.4/1/99), 742 So.2d 556; *Rosell v. ESCO,* 549 So.2d 840, 844-45 (La.1989). The issue to be resolved by the reviewing court is not whether the factfinder was right or wrong, but whether his conclusion was a reasonable one. *Brown v. Seimers,* 726 So.2d at 1021; *Stobart v. State, Through DOTD,* 617 So.2d 880, 882 (La.1993). Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Brown v. Seimers,* 726 So.2d at 1021; *Stobart v. State, Through DOTD,* 617 So.2d at 882. However, where documents or objective evidence so contradict a witness's story, or the story itself is so

> internally inconsistent or implausible on its face that a reasonable factfinder would not credit the witness's story, the court of appeal may find manifest error, even in a finding purportedly based upon a credibility determination. *Rosell v. ESCO,* 549 So.2d at 844-45.

The jury found Diamond negligent under the Jones Act, and further found that this negligence was a cause in the development of plaintiff's condition. An employer's negligence may arise in many ways, including the failure to use reasonable care to provide a seaman with a safe place to work, the existence of a dangerous condition on or about the vessel, or any other breach of the duty of care. *Foster v. Destin Trading Corporation,* 96-0803 (La.5/30/97), 700 So.2d 199, 208. Evidence of Diamond's negligence included testimony that Diamond employees improperly dumped oil-based muds into Lake Maracaibo and used polluted lake water in the water system used for drinking water. Plaintiff testified that his job duties included working with drilling muds in a room that reached temperatures as high as 160 degrees. The defense presented testimony to controvert this evidence, but the jury apparently believed the testimony showing that Diamond was negligent. While there are certainly two permissible views of the evidence in this case, the jury made credibility determinations and chose to believe the evidence supporting plaintiff's claim that Diamond was negligent under the Jones Act. Based on the evidence presented, we find no manifest error in the jury's conclusion on that issue.

On the issue of causation, a seaman need only present "slight evidence" that his employer's negligence caused his injuries. *George v. Delta Queen Steamboat Co.*, 2001-1902, p. 11 (La.App. 4 Cir. 9/10/03), 854 So.2d 476, 482. Even under the "slight evidence" standard, this case is a close call.

As stated above, after a *Daubert* challenge, the trial court ruled that Dr. Carter could not testify as to the causes of SIBM, but could only testify as to his treatment of plaintiff. Defense counsel made a general objection at the beginning of Dr. Carter's testimony to his testifying as to SIBM. Despite being instructed by the trial court as to the limitations on his testimony, Dr. Carter stated that environmental, chemical and heavy metal contamination that plaintiff was exposed to in Venezuela while working for Diamond is the most likely cause of all of his illnesses. This statement was clearly beyond the scope of Dr. Carter's qualifications to testify as determined by the trial court, and the trial court should have instructed the jury to disregard this statement. The trial court erred in failing to do so. However, this error was harmless in that Dr. Carter's testimony as to causation was cumulative to the testimony of Dr. Jaffe.

Dr. Jaffe testified that his opinion is that plaintiff's exposure to toxic chemicals, combined with heat shock, while working on the *Ocean Spartan* was a sufficient predisposing cause of his illnesses, including his SIBM. He admitted that his conclusion is a hypothesis that has not been confirmed. However,

in *Davis v. ODECO,* 18 F.3d 1237 (5th Cir.1994), evidence of medical causation included an inconclusive hypothesis that exposure to hydrocarbons while working aboard the defendant's vessels caused plaintiff to contract a rare disease called Goodpasture's Syndrome, or GPS. The Court held that even though the evidence as to causation was tenuous, "there was not a complete absence of probative factual evidence on the issue of medical causation – as there must be to overturn a jury verdict under the Jones Act." *Id.* at 1242. The Court further stated that the plaintiff was entitled to recovery under the Jones Act if he adduced probative evidence that the defendant's negligence played any part, however small, in the development of his condition. *Id.* at 1242-1243.

We find that plaintiff carried his burden of proving medical causation through the testimony of Dr. Jaffe. Although the evidence presented by plaintiff to establish medical causation is underwhelming, it is sufficient to support the jury's verdict under the "slight evidence" standard applicable to the causation prong of a liability determination in a Jones Act case.

In its next assignment of error, Diamond argues that the trial court committed error by improperly instructing the jury. One of the instructions to the jury included the following sentence: "Mr. Lewis alleges that his condition was caused by his exposure to toxic chemicals and heavy metals and the working conditions aboard the *Ocean Spartan* in Lake Maracaibo, Venezuela." The jurors sent a written note to the trial court stating, "We are having an issue with

Mr. Lewis' 'condition' and what that includes. Explain condition with the Jones Act negligence. Does it include *all* illnesses or just SIBM?" Both plaintiff's counsel and defense counsel agreed to substitute the word "illness" for the word "condition." The court told the jurors that only they could determine what illnesses may or may not have been caused by the conditions aboard the *Ocean Spartan*.

Diamond argues that plaintiff was diagnosed with three separate conditions: (1) SIBM, (2) gastrointestinal distress (diarrhea) and (3) hypertension. Diamond claims that the court erred in its clarified instruction by suggesting to the jury that proof of causation of any illness entitled the plaintiff to recovery for all illnesses, including SIBM, for which Diamond claims there is no evidence of causation. Diamond's issue with the trial court's clarification to the jury seems to be that the court used the word "illnesses" instead of "illness." However, counsel for Diamond did not object at the time the court gave this clarification to the jury. Defense counsel's objection was made after the clarification and outside the presence of the jury. The objection was not timely. We find no merit in this argument.

Diamond next argues that the trial court erred in failing to grant a mistrial on three separate occasions and committed numerous errors in its evidentiary rulings, which resulted in substantial prejudice to Diamond. Diamond refers to several instances in which plaintiff's counsel made several allegedly inflammatory remarks about Diamond. Diamond also

refers to instances in which it claims the trial court allowed plaintiff's counsel to improperly state the law to the jury. It also points out instances where plaintiff's counsel attempted to elicit testimony on issues that the court had ruled inadmissible.

Our review of the record reveals no error on the part of the trial court in denying Diamond's requests for mistrial. Furthermore, we find no basis for overturning the trial court's evidentiary rulings cited by Diamond. This assignment of error has no merit.

Before we address Diamond's assignment of error regarding the award of general damages, we will consider Diamond's arguments relating to the award of maintenance and cure to plaintiff. Diamond argues that the trial court erred in failing to submit a jury interrogatory asking the jury to determine the date when plaintiff reached maximum medical improvement. Included in the jury instructions is the following statement by the trial court:

> The maintenance and cure duty terminates only when maximum cure has been reached. Maximum cure is the point where it is probable that further treatment will result in no betterment of the seaman's condition. Namely, any future treatment is for the purpose of reducing pain or maintaining him in the same condition.

As this instruction correctly states the law as to the issue of maximum medical improvement, the trial court did not err in failing to also include a jury

interrogatory on the issue of the date of maximum medical improvement.

Diamond also argues that the trial court erred in failing to conform the judgment to reflect that under general maritime law, no maintenance or cure is owed once a disease/condition is determined to be incurable. The jury verdict included an award of $27,116.00 for maintenance and $1,710,830.60 for cure. The law as to the right to maintenance and cure was set forth in *Dejean v. St. Charles Gaming Co., Inc.*, 2005-0019, p. 3 (La.App. 3 Cir. 5/4/05), 903 So.2d 521, 523-524, as follows:

> "[T]he right to maintenance and cure must be construed liberally. . . ." *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 633 (3rd Cir.1990). "Cure" involves the payment of therapeutic, medical, and hospital expenses, that are not otherwise furnished to the seaman, until the point of maximum cure. *Pelotto v. L & N Towing Co.*, 604 F.2d 396 (5th Cir.1979); *Taylor v. Mutual of Omaha Ins. Co.*, 520 So.2d 1122 (La.App. 3 Cir.1987). "When maintenance and cure terminates is a question of fact to be determined on the evidence presented." *Thurman v. Patton-Tully Transp. Co.*, 619 So.2d 879, 881 (La.App. 3 Cir.1993). The duty of the shipowner to furnish medical care continues until the sick or injured person has been cured or until the sickness or incapacity has been declared to be permanent. *Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949). Maintenance and cure extends during the

> period when a seaman is incapacitated and continues until he reaches maximum medical recovery. *Breese v. AWI, Inc.*, 823 F.2d 100 (5th Cir.1987). It is the medical, not the judicial, determination of permanency that results in the termination of the right to maintenance and cure. *Id.* "[M]aximum cure is achieved when it appears probable that further treatment will result in no [b]etterment of the seaman's condition." *Pelotto*, 604 F.2d 396, 400. "Thus, where it appears that the seaman's condition is incurable, or that future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved." *Id.*

Although the medical experts testifying at trial agreed that there is no known cure for SIBM, Drs. Carter, Harch and Jaffe testified that certain therapies undergone by plaintiff have improved and will continue to improve his condition. Diamond presented the testimony of several medical experts who disagreed with the opinions of the plaintiffs' experts on this issue, but the jury apparently chose to believe the testimony that plaintiff's condition has and will continue to improve with chelation and/or hyperbaric oxygen therapy treatments. By awarding maintenance and cure benefits to plaintiff, the jury established through its verdict that it does not believe that plaintiff has reached maximum medical improvement. While there are certainly two permissible views of the evidence on this issue, we cannot say the jury

was manifestly erroneous in choosing the evidence in support of an award of maintenance and cure benefits to plaintiff. This assignment of error is without merit.

Diamond also argues that the trial court judgment reflects a duplication of damages in favor of plaintiff. Specifically, Diamond objects to the fact that plaintiff was awarded maintenance and cure, in addition to a general damages award that included amounts that are the equivalent of maintenance and cure. Maintenance is a form of compensation that arises out of the employment contract and is a daily stipend for living expenses, or an amount covering expenses for the cost of food and lodging that is equivalent to the food and lodging that he would have received on the vessel. *Domonter v. C.F. Bean Corporation,* 99-1204, p. 18 (La.App. 5 Cir. 4/25/00), 761 So.2d 629, 640. Cure is payment of the seaman's medical, therapeutic and hospital expenses, until that point in time when plaintiff reaches maximum medical recovery. *Id.*

While we find no error in the trial court's maintenance and cure awards, we do find that part of the general damages award is duplicative of the award for cure. The jury interrogatory form shows that the damages award of $5,409,655.00 represents future medical care, past income loss, future wages and found [sic] and impairment of earning capacity or ability in the future, including impairment in the normal progress in plaintiff's earning capacity due to his physical condition, physical pain and suffering including physical disability, impairment, inconvenience,

and the effect of plaintiff's injuries and inconvenience on the normal pursuits and pleasures of life, past mental anguish and feeling of economic insecurity caused by plaintiff's disability, future mental anguish and feelings of economic insecurity caused by plaintiff's disability.

An award for cure represents past and future medical care. The record shows that plaintiff's medical expenses as of the time of trial were $451,066.42. We conclude that of the $1,710,830.60 awarded for cure, $451,066.42 represents past medical expenses and $1,259,764.18 represents future medical expenses. Included in the general damages award is the item of future medical care. Thus, the general damages award of $5,409,655.00 must be reduced by $1,259,764.18 as this latter amount is duplicative of the award for cure. Accordingly, the general damages award will be amended to the amount of $4,149,890.82. We are not disturbing the amounts awarded to plaintiff for maintenance and cure, $27,116.00 and 1,710,830.62 respectively.

In another assignment of error, Diamond argues that the trial court erred in awarding excessive general and future medical damages that were not supported by the evidence. Specifically, Diamond argues that the evidence only established a possible causal link to gastrointestinal illness. As stated above, plaintiff carried his burden of proving causation as to all of his illnesses, including SIBM.

Diamond also alleges that plaintiff has offered no evidence of physical pain and suffering as a result of his SIBM. Diamond argues that plaintiff is not entitled to an award for pain and suffering because it alleges that the record contains no evidence that plaintiff suffered any physical pain or required any pain medication for his SIBM. According to Diamond's calculations, the jury awarded plaintiff $3,142,290.80 for pain and suffering. Diamond arrived at this figure by subtracting from the total damages award the amounts awarded for future medical expenses and past and future lost wages. Other than the award for future medical expenses, which we have found to be duplicative to the cure award, and the award for past and future wages, the general damages award includes physical pain and suffering including physical disability, impairment, inconvenience, and the effect of plaintiff's injuries and inconvenience on the normal pursuits and pleasures of life, past mental anguish and feeling of economic insecurity caused by plaintiff's disability, future mental anguish and feelings of economic insecurity caused by plaintiff's disability.

In *Duncan v. Kansas City Southern Railway Co.*, 2000-0066, p. 13 (La.10/30/00), 773 So.2d 670, 682, the Louisiana Supreme Court stated:

> General damages are those which may not be fixed with pecuniary exactitude; instead, they "involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment,

> or other losses of life or life-style which cannot be definitely measured in monetary terms." *Keeth v. Dept. of Pub. Safety & Transp.*, 618 So.2d 1154, 1160 (La.App. 2 Cir.1993). Vast discretion is accorded the trier of fact in fixing general damage awards. La. Civ.Code art. 2324.1; *Hollenbeck v. Oceaneering Int., Inc.*, 96-0377, p. 13 (La.App. 1 Cir. 11/8/96); 685 So.2d 163, 172. This vast discretion is such that an appellate court should rarely disturb an award of general damages. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La.1993), *cert. denied,* 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Thus, the role of the appellate court in reviewing general damage awards is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. *Youn,* 623 So.2d at 1260.

With the exception of the portion of the general damages award representing future medical care, or $1,259,764.18, we find no abuse of the trier of fact's vast discretion in the balance of the general damages award. This assignment of error is without merit.

Diamond also argues that the award of future medical expenses is not proportionate with plaintiff's life expectancy as predicted by Dr. John Olsen. As stated above, we are amending the general damages award to subtract the amount for future medical care already included the cure award. However, we will address the correctness of the amount awarded for future medical care in the cure award.

A reading of Dr. Olsen's testimony shows that he stated that people with Lou Gehrig's disease, which he analogized to SIBM, die about 6 to 18 months after the disease affects swallowing, and his assumption is that the same would be true for SIBM patients such as plaintiff who have developed swallowing problems. Dr. Olsen did not offer an estimate as to plaintiff's life expectancy other than to say his prognosis is not good unless his condition is treated. Dr. Larry Stokes, an expert in vocational rehabilitation counseling and life-care planning, testified as to the range of plaintiff's estimated future medical expenses and said these expenses could be as high as $180,607.00 annually. Dr. Randolph Rice, an expert economist, reviewed the figures suggested by Dr. Stokes, and testified as to his opinion of plaintiff's future health care costs based on his estimation that plaintiff's life expectancy from the time of trial could be as much as 23.59 years. Based on the evidence presented on this issue, we cannot say the trial court abused its discretion in the award for future medical care included in the cure award.

In its next assignment of error, Diamond argues that the award for cure should be reduced because some of plaintiff's medical expenses were paid for by other sources including Medicare/Medicaid and plaintiff's wife's health insurance carrier. We do not find that Diamond has produced sufficient evidence to support its claim that it is entitled to credit for payments of medical expenses from collateral sources. This assignment of error is without merit.

Diamond argues that plaintiff is not entitled to pre-judgment interest. On the issue of interest, the trial court judgment stated that interest was awarded "at the legal rate, in accordance with law, and all costs of these proceedings." Post-trial, plaintiff filed a Motion to Set Pre-Judgment Interest, which was denied by the trial court. Thus, the trial court determined that plaintiff is not being awarded pre-judgment interest, and we find no abuse of the court's discretion in so ruling. This assignment of error is without merit.

In its next argument, Diamond argues that it has been prejudiced by an incomplete trial transcript. Specifically, Diamond argues that its objections to jury instructions, and the court's rulings on the same, were not transcribed by the court reporter. Counsel for Diamond cites a conversation between him and the court reporter, in which she allegedly told him that she had destroyed her notes and recordings once she prepared the transcript. Diamond contends that this was a violation of Uniform District Court Rule 4.0 and La. C.C.P. article 372, which requires a court reporter to retain her notes and recordings for at least two years after transcription is completed. We cannot verify from the record before us the allegations that Diamond has made regarding the court reporter. However, we note that the record includes some objections to jury instructions by Diamond and the court's rulings on the same. Assuming arguendo that the transcript omits other objections by Diamond, we find that any error was harmless because the

instructions given to the jury fairly and accurately set forth the legal principles applicable in this case. This assignment of error has not merit.

As stated above, the appeal of the judgment on the merits was consolidated with the appeal of the judgment taxing costs for expert witnesses against Diamond. In its October 5, 2007 judgment, the trial court taxed costs against Diamond for the following expert fees: $7,500.00 as to Dr. Carter, an additional $8,000.00 as to Dr. Jaffe, $824.00 as to Dr. England, $1,059.00 as to Dr. Engel, $1,375.00 as to Mr. Petty, $1,619.50 as to Dr. Rice and $1,500.00 as to Dr. Olsen. On appeal, Diamond argues that the trial court erred in awarding excessive and unreasonable amounts to plaintiff's experts, Drs. Jaffe and Carter. The trial court has the discretion to tax as costs expert fees for preparatory, non-testifying expenses, in addition to costs for time spent testifying at trial. *Vela v. Plaquemines Parish Government,* 2000-2221 to 2000-2224, p. 30 (La.App. 4 Cir. 3/13/02), 811 So.2d 1263, 1282-1283. Based on the evidence presented on the issue of expert witness costs, we cannot say the award of expert costs was excessive or unreasonable. We find that the trial court did not abuse its discretion in its award of costs.

For the reasons stated above, we reduce the total amount of the trial court judgment in case number 2007-CA-0497 from $7,147,601.60 to $5,887,837.42. In all other respects, we affirm the judgment in case

number 2007-CA-0497. We also affirm the trial court judgment in case number 2007-CA-1566.

AMENDED, AND AS AMENDED, AFFIRMED.

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

Jimmy Lewis No. 97-5576

v.

Diamond Offshore Company, et al Division N

Filed: _____ Deputy Clerk: _____

****

JUDGMENT

Considering the verdict of the jury, rendered on November 30, 2006, and the Motion for Entry of Judgment, made in open court on said date by counsel for Plaintiff, Jimmy Lewis:

IT IS ORDERED BY THE COURT that judgment is hereby granted in favor of Plaintiff, Jimmy Lewis, against Defendant, Diamond Offshore Drilling Incorporated, in the amount of **SEVEN MILLION ONE HUNDRED FORTY-SEVEN THOUSAND SIX HUNDRED ONE AND 60/100 DOLLARS ($7,147,601.60)**, plus interest at the legal rate, in accordance with law, and all costs of these proceedings.

New Orleans, Louisiana, this 5 day of December, 2006.

/s/ Ethel S. Julien
DISTRICT JUDGE

The Supreme Court of the State of Louisiana

JIMMY LEWIS

VS. NO. 2009-C-1386

ODECO, INC., MURPHY EXPLORATION AND PRODUCTION COMPANY AND DIAMOND OFFSHORE DRILLING COMPANY C/W JIMMY LEWIS VS. ODECO, INC., MURPHY EXPLORATION AND PRODUCTION COMPANY AND DIAMOND OFFSHORE DRILLING COMPANY

IN RE: Diamond Offshore Drilling Co.; – Defendant; Applying For Writ of Certiorari and/or Review, Parish of Orleans, Civil District Court Div. N, No. 97-5576; to the Court of Appeal, Fourth Circuit, Nos. 2007-CA-0497, 2007-CA-1566;

October 16, 2009

Denied.

BJ

CDK

BJJ

JLW

GGG

VICTORY, J., would grant.

KNOLL, J., would grant.

No. 09-769

Supreme Court, U.S.
FILED
JAN 22 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DIAMOND OFFSHORE DRILLING, INC.,

Petitioner,

versus

JIMMY LEWIS,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

OPPOSITION TO PETTTION FOR WRIT OF CERTIORARI

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COUNTER QUESTIONS PRESENTED FOR REVIEW

I. Does a lower court who allegedly commits error in its application of the *Daubert* test in ruling on the admissibility of expert testimony in an admiralty case, commit legal error by "lowering the standard of admissibility of evidence," or does it merely abuse its discretion in acting as gatekeeper under well-established law?

II. Under general maritime law, can a maritime employer be required to pay cure when:

A. the plaintiff has not reached maximum medical improvement, and is undergoing therapeutic treatments that are improving his condition;

B. future care will continue to afford him improvement, for a specified duration according to a specific treatment plan;

C. the employer fails to prove that there were collateral sources that supplied the injured employee with duplicative cure?

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OPINIONS BELOW

Respondent objects to those portions of the petitioner's statement that are nothing more than petitioner's erroneous arguments about the holdings of the courts below. Respondent vehemently objects to the statement that the appellate court held that there was "no valid scientific evidence of causation." This is simply false. Likewise false is the assertion that the appellate court relied upon pre-*Daubert* law. The appellate court found that it would not revisit the *Daubert* issue as it had previously considered it on interlocutory writs and found no abuse of discretion in the trial court's application of the doctrine. The court then went on to apply the law with regard to the standard of proof (featherweight) in Jones Act and general maritime law cases, which is of course an entirely different issue than admissibility of evidence under *Daubert*. *See e.g., Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 (2d Cir. 2004) (holding that even though a Jones Act "plaintiff faces a relaxed burden of proof with regard to causation, the district court's admission of expert testimony is nonetheless governed by the strictures of [Evidence] Rule 702 and *Daubert,*" and noting that the Sixth and Ninth Circuits have reached the same conclusion). Whether the appellate court failed to "adequately" discuss the law with regard to maintenance and cure is certainly a matter of opinion, and is hardly writ worthy even if true.

Moreover, there are erroneous factual statements made, such as that it is "undisputed" the causes of

SIBM are unknown and that it is incurable. Likewise erroneous is the contention that respondent alleged that his injuries are the result of SIBM. His injuries are the result of acute metal poisoning, exhaustion, and improper nutrition.

STATEMENT OF THE CASE

Jimmy Lewis is a functional quadriplegic. His condition differs from that of a true quadriplegic only in that his spinal cord is not severed. Instead, the muscles that are enervated by the nerves coming from the spinal cord do not work properly. Supp. Tran. 9/18/09, II of 8, at 59-60, 62, 63; III of 8, at 75, 76, 98, 100. His diagnosis includes quadriplegia, sporadic inclusion body myositis (SIBM), malignant hypertension, and intestinal inflammation all as a result of being poisoned by toxic chemicals and heavy metals while working aboard the vessel *Ocean Spartan*. Supp. Tran. 9/18/09, III of 8, at 78-80, 101-102, 111-112; P. Ex. 8, at 43, 143-144.

Mr. Lewis began working on the *Ocean Spartan*, a movable, ocean going drilling rig then working in the Gulf of Mexico, in 1987, as a Motorman. Supp. Tran. 9/18/09, II of 8, at 96-97. Mr. Lewis was an excellent employee, a fact conceded by his fellow employees and supervisors, and documented in his Employment Record, entered as a joint exhibit. Supp. Tran. 9/18/09, V of 8, at 99.

The *Ocean Spartan* sailed from the Gulf of Mexico to Lake Maracaibo, Venezuela, in 1991 and immediately began drilling operations. Supp. Tran. 9/18/09, II of 8, at 98. Lake Maracaibo is a highly polluted body of water, a fact known to the vessel's crew as well as supervisory personnel. Supp. Tran. 9/18/09, II of 8, at 104, VII of 8, at 27, 116. The Alfa Laval water making machine aboard the SPARTAN "wasn't designed to make water from the lake water." Supp. Tran. 9/18/09, V of 8, at 95. Yet, crew members testified that throughout the three years in Venezuela, in Lake Maracaibo, they were using the water maker. Supp. Tran. 9/18/09, II of 8, at 106-108; III of 8, at 31.

Despite company rules to the contrary, Diamond's tool pusher (the equivalent of the vessel captain), Wade Reason, testified that he regularly ordered that oil based mud be washed overboard into the waters of Lake Maracaibo. Supp. Tran. 9/18/09, VII of 8, at 94. The drilling mud was washed overboard in the immediate vicinity of the intake from which the vessel's drinking water was obtained from the lake. Supp. Tran. 9/18/09, VI of 8, at 122. Literature provided by Alfa Laval, the maker of the vessel's water making machine, warned against using the machine to process polluted water. Supp. Tran. 9/18/09, VI of 8, at 128. In addition, the machine malfunctioned to the extent that it pumped polluted lake water directly into the vessel's drinking water system. Supp. Tran. 9/18/09, II of 8, at 106-108; VIII of 8, at 31. The drilling mud used included quantities of antimony, arsenic, barium, calcium, lead, mercury, nickel,

vanadium and zinc, among other heavy metals and toxins detailed in Exhibit D-5 and all of which were found in similar concentrations in Mr. Lewis' body. Supp. Tran. 9/18/09, VI of 8, at 15; III of 8, at 78-80, 101-102, 111-112.

Mr. Lewis continued to work on the *Ocean Spartan* and to suffer recurring complaints. He sometimes felt weak while working on the *Ocean Spartan* in Lake Maracaibo but attributed his weakness to his constant diarrhea and nausea as well as having to work in temperatures which reached 140 to 160 degrees in the areas such as the Mud Room.[1] This subjected Mr. Lewis to heat shock.[2] As Mr. Lewis stated, he attributed his occasional feelings of weakness "to working conditions, stress, and heat, and bad water and food." Supp. Tran. 9/18/09, VIII of 8, at 7.

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[1] The Mud Room was the area in which the equipment used for circulating the drilling mud was located. The temperature of the mud as it came from the drill hole reached as much as 150 to 160 degrees Supp Tran. 9/18/09, VI of 8, at 9-10, 106-111. Mr. Lewis had to enter the area as often as six or eight times a day and spend extended periods there when working on machinery. Supp Tran. 9/18/09, II of 8, at 20.

[2] Heat shock is exposure to an extreme condition such as heat for a sufficient period of time, typically minutes, for the immune system of the body to mobilize a series of inflammatory proteins called heat shock proteins ("HSP"). These proteins, whose effect is long-lasting, reduce the body's protective system and make an individual chronically susceptible to toxic metal accumulation inside the mitochondria and cause death to the mitochondria. P. Ex. 8, at 43, 77.

Laboratory tests show that Mr. Lewis' body contains substantial amounts of antimony, arsenic, barium, cadmium, chromium, cobalt, copper, fluoride, lead, mercury, nickel, vanadium, and zinc. Tests also show that Mr. Lewis is highly allergic to many of the toxins contained in the drilling fluids used on the *Ocean Spartan*, arsenic in particular. Tests requested by his treating physician show that his particular genetic make-up, APO-3, makes it virtually impossible for his body to rid itself of the poisons encountered on the *Ocean Spartan*.

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. No writ worthy *Daubert* errors were committed.

A. The lower courts applied *Daubert*, even if they did so in an erroneous manner.

1. The lower courts conducted *Daubert* hearings on each of Diamond's requests, and held that Dr. Jaffe's testimony was admissible under the *Daubert* standard.

Diamond pretends in its writ as if the lower courts ignored *Daubert* entirely, and held that the *Daubert* rule is not applicable in admiralty cases. This is simply wrong. Diamond asked for and received *Daubert* hearings with regard to the two experts it objected to, and even went to the

extraordinary step of taking intermediate interlocutory supervisory writs prior to trial with regard to one of them (Dr. Jaffe). *See* page 18, *infra*. It received a second *Daubert* hearing immediately prior to trial with regard to the other (Dr. Carter). Petitioner's real complaint is that *Daubert* was misapplied, not that it was ignored. And, it makes this complaint without any mention of the appropriate standard of review to be applied in determining whether the lower courts committed error in their *Daubert* rulings, which is "clearly erroneous." *See Mistich v. Volkswagen of Germany*, 666 So.2d 1073, 1079 (La. 1996). As is stated in this Court's Rule 10: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

2. The district court was not clearly erroneous in admitting Dr. Jaffe's testimony.

Diamond's main contention with regard to Dr. Jaffe's testimony is that his causation conclusion is not supported by any peer reviewed commentary, or empirical studies. This is incorrect, as will be demonstrated below. But even if it were, that would not be automatic grounds for exclusion. If Dr. Jaffe's conclusion is based upon sound scientific reasoning – the kind of analytic thought process employed by those in his field to opine about the causes of particular illnesses in the absence of concrete and definitive studies – than it meets the requirements of

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and is admissible. "[T]here is no bright-line standard and when an expert otherwise reliably utilizes scientific methods to reach a conclusion, lack of textual support may go to the weight, not the admissibility of the expert's testimony *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 354 (5th Cir. 2007). "In short, *Daubert* neither requires nor empowers trial courts to determine which of several competing theories has the best provenance." *Ruiz-Troche v. Pepsi Cola Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998) (citations omitted). This is true even in cases where a particular theory of causation advanced by an expert has not been studied before, and is not the subject of peer reviewed commentary.[3]

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[3] As the Fifth Circuit observed

> The lack of literature on injection-related salmonella infections of the joint does not undermine Dr. Coco's hypothesis. As the Supreme Court explained in *Kumho Tire*, "[i]t might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Where, as here, there is no evidence that anyone has ever contracted a salmonella infection from an injection of any kind into the knee, it is difficult to see why a scientist would study this phenomenon. We conclude, therefore, that the lack of reports in the literature that any knee injectable other than Synvisc has caused a salmonella infection, supports, rather than contradicts, Dr. Coco's conclusion that the infection

(Continued on following page)

There can be no doubt as to Dr. Jaffe's qualifications. Dr. Russell Jaffe, MD, Ph. D., CCN, is a Diplomat of both the National Board of Medical Examiners and the American Board of Clinical Pathology and has a dual certification for both Clinical and Chemical Pathology. He received his undergraduate and medical training at Boston University. He was at the National Institutes of Health (NIH) in Bethesda, Md., from 1973 through 1979, serving as a Senior Staff Physician from 1975 through 1979. While at NIH he worked in conjunction with Dr. King Engel in dealing with patients with Inclusion Body Myosotis. P. Ex. 8, at 33. Dr. Jaffe has served as a consultant with numerous industry groups and corporations including the Health Insurance Association of America and Royal Dutch Shell with regard to issues of hypersensitivity and immune reactions to heavy metals including mercury, cadmium and arsenic. P. Ex. 8, at 147-48. Dr. Jaffe worked on the first indoor environmental quality

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did not arise due to unsterile technique or other source not related to Synvisc.

Pipitone v. Biomatrix, Inc., 288 F.3d 239, 246 (5th Cir 2002), distinguishing *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir. 1998), *cert. denied*, 526 U.S. 1064, 119 S.Ct. 1454, 143 L.Ed.2d 541 (1999), and *Black v. Food Lion, Inc.*, 171 F3d 308, 312-13 (5th Cir. 1999). *See also Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062, 105 S Ct. 545, 83 L.Ed.2d 432 (1984) (cause and effect relationship need not be established by animal or human studies before a doctor can testify "as long as the basic methodology employed to reach such a conclusion is sound.").

report for the Department of Consumer Affairs of the State of California. These studies addressed the effect of heavy metals in the working environment. P. Ex. 8, at 147-49. Dr. Jaffe has been involved in developing functional and predictive tests to measure toxic metals at the cellular level and has developed methodology to examine the immune hypersensitivity of certain individuals who develop delayed reactions to heavy metals, such as mercury, cadmium and arsenic. P. Ex. 8, at 148. He is the Director and CEO of a nationally recognized testing laboratory. P. Ex. 8, at 8-9. In short, Dr. Jaffe is eminently suited to address questions such as those presented in this case including the cause of the cell death in Mr. Lewis' muscles and its relationship to heavy metals, the effect on the mitochondria and the creation of inclusions, and whether heavy metals caused, triggered or accelerated a previously benign condition. Further, with his laboratory and testing background, Dr. Jaffe is more than qualified to address issues regarding testing for heavy metals as well as their effect.

Nor is there anything lacking in Dr. Jaffe's methodology. He studied Mr. Lewis' medical records, and consulted extensively with Dr. Carter, the treating physician. P. Ex. 8, at 7-8, 13. He interviewed Mr. Lewis to rule out other potential causes of his condition. P. Ex. 8, at 25. He reviewed the toxicological reports of the conditions on board the rig. P. Ex. 8, at 16. He reviewed all the available literature on the subject of SIBM, including studies that have

ruled out a host of possible causes, such as genetics, psychological factors, viruses, and infections. P. Ex. 8, at 31, 133-134. But, it is important to note that the focus of Dr. Jaffe's inquiry was not SIBM in general, but rather the specifics of Mr. Lewis' case, a task for which he was particularly well suited given that he has studied the effect of heavy metals on the body as was presented by Mr. Lewis' situation. P. Ex. 8, at 31, 104, 147.

At this point, it is best to turn to the words of Dr. Jaffe himself, who best explains the soundness of his reasoning that produced his conclusion that Mr. Lewis' condition was caused, at least in part, by the conditions he was exposed to and under which he worked on the *Ocean Spartan*.

> Q. So it would be fair to say then that you're not aware of any credible scientific studies that established that heavy metal exposure causes sporadic inclusion body Myosotis? * * *
>
> A. The simple answer to your question is no, and there is a qualification. * * * The qualification is that I find strong evidence that exposure to toxic metals like lead, mercury, cadmium and arsenic at levels that Mr. Lewis could have been exposed to, at a time when he was distressed because of heat shock exposure that would have reduced his innate protective antitoxic mineral production and made him now newly and chronically susceptible to toxic metal

accumulation, and that toxic metal accumulation inside the mitochondria causes death to the mitochondria and a dead mitochondria become an inclusion body.

So I can point you to literature that says toxic metals are bad for mitochondria, they uncouple and electrically short-circuit the battery and the cell. The mitochondria is actually a cell inside our cells, this is a technical footnote, but mitochondria actually are independent organisms living inside our cells and they have their own DNA, they divide on their own sequence, it is a whole complicated history. But the relevant point here is that toxic metals at the level that Mr. Lewis was exposed to them might well have under certain conditions accumulated in him and caused the death of mitochondria, and those dead mitochondria become inclusion bodies, what we called in the biopsy inclusion body Myosotis. That's my reasonably certainly medical opinion.

P. Ex. 8, at 42-44.

A. The best evidence we have is that the people whose muscles die for lack of energy do so because their batteries, their mitochondria have been poisoned. That is the best information we have scientifically.

Q. And you mentioned early on there was a study you referenced that suggested that – well you said showed that in fact the inclusions could be caused by exposure to heavy metals.

A. Correct.

Q. What is that study?

A. The study is as follows: If you expose a cell or an organism to mercury or lead or cadmium, or more particularly to a combination of them, that you first find that their mitochondria become uncoupled, they do not produce energy. And if you keep that up chronically, you find that the mitochondria die and the remnants of them are what we call inclusion bodies and inclusion body Myosotis.

Q. Are these the same inclusions that you find in inclusion body Myosotis?

A. The same, the very same. * * *

Q. Is there more than one study?

A. There are several studies, but this particular study points out that lead causes the fibrillation, which means the production of what are abnormal proteins specifically something called alfa synuclean. And when that specific molecule inside the mitochondria gets oxidized, that mitochondria, that battery inside the cell is on its way to dying. And

if [it] doesn't get corrected, rehabilitated or protected by an antioxidant, by ascorbate, that mitochondria is on its way to dying.

And this study has been . . . in the test tube, but other studies where you feed lead, say inadvertently to battery workers in Vermont, you find that they get a specific kind of muscle fatigue and atrophy, and when you do biopsies and look at the ulrastructure you find inclusion bodies.

No it isn't inclusion body myositis, but it is inclusion bodies caused by toxic metals. So not all inclusion bodies are definitive for the diagnosis of inclusion body Myosotis, as often happens in science. * * * Medicine is a clinical art, it's a descriptive art, it is not as much of a science as we would like it to be.

Q. In your – have you attempted to do an extensive research of this question of the inclusions and the – and inclusion body Myosotis?

A. I have.

Q. Are you aware or have you found any research, any studies which rule out exposure to heavy metals as they cause an –

A. Not one, that has not been ruled out.

Q. Those exhibits you've produced for us, are those peer-reviewed documents.

A. Every one of these documents is peer reviewed.

P. Ex. 8, at 142-149.

Q. Can you say with any degree of medical probability whether Mr. Lewis would have accrued this disease even had he not been employed on the *Ocean Spartan*?

A. I can say within a reasonable degree of medical certainty that he would not.
* * *

Q. What basis do you have to say that?

A. Because you asked my considered scientific medical opinion, based on hundreds of hours of research, of synthesis of information, of doing my own discussions, as well as my readings of everything that I could – everything I could get my hands on, everything that was made available to me, I have put together. And it is my considered medical opinion that without his specific work history on the oil rig in Lake Maracaibo, Venezuela that he would not, in my opinion, have sporadic inclusion body Myosotis.

P. Ex. 8, at 99.

Dr. Jaffe's methodology, reasoning, and conclusion is not the kind of rank speculation that was rejected in *Food Lion*, because his approach to the problem reveals a well accepted method applying scientific principles which are well established in the literature as to how heavy metal intoxication could lead to death of the mitochondria and thus body inclusions. He used all the tools of medicine and science at his disposal to carefully evaluate the facts before him, and to reach a carefully considered opinion based upon the best science and information available to him.[4] True, unlike the defense experts, he did not throw up his hands and say, "SIBM, end of discussion – no cause, no cure." Rather, he was called upon to study the specifics of Mr. Lewis' case and determine the most probable cause of his present condition, given all that he had endured on the *Ocean Spartan*. There was sufficient information in the scientific literature, as well as in his own area of expertise, to allow him to complete this task.

The district court certainly was not "clearly erroneous" in allowing him to testify. And yet, even if it was, there would be nothing presented here except the failure to apply well established law correctly,

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[4] He even consulted a neurologist to confirm his approach and conclusions, thus eliminating one of Diamond's chief complaints that Dr. Jaffe was not qualified to opine because he was not a neurologist This Board Certified neurologist was in full agreement with Dr. Jaffe's logic, science, and conclusions P. Ex. 8, at 128-30.

which is not an error that justifies this Court's intervention.

B. Diamond continues to misrepresent this case as one involving admission of expert testimony regarding the cause of a disease which allegedly has an "unknown" cause.

The issue in this case is not whether metal poisoning is the cause of Sporadic Inclusion Body Myositis. It is not even whether heavy metals are *a* cause. It is whether the conditions experienced by Mr. Lewis aboard the *Ocean Spartan* – the toxic drilling mud, drinking contaminated water, eating unnutritious food, and working in 160 degree temperature – was a cause of his present condition, which is a quadriplegic state that has been characterized as adult muscular dystrophy, in addition to chronic diarrhea and high blood pressure.

One fact that Diamond continues to ignore in its "SIBM – no cause, no cure" approach to this case is that Mr. Lewis' alleged SIBM is very atypical. Generally the disease has a long latency period, and is characterized as an older person's disease, usually not beginning until at least the mid-50's and not manifesting itself to its full extent, and thus resulting in a wheel-chair confined life, until much later. Here, Mr. Lewis' case progressed rapidly, had a short latency, and struck fully when he was 35. P. Ex. 8, at 46, 76.

Accordingly, in evaluating the evidence of cause, it was the petitioner's experts who sought to look beyond the diagnosis of SIBM, and did not simply throw their hands up decrying this is a hopeless case. They probed further, and sought to determine the source of Mr. Lewis' condition, whether it was independent of SIBM, the result of an exacerbated case of SIBM, or SIBM itself. In so doing, they relied upon all the tools available to them, as well as their high degree of specialization and skill. There was no error in the evidence that the jury received on the issue of cause, even if, conceding for the sake of argument that the general cause of generic SIBM in the population at large might not be presently known.

C. State law procedural matters prevent any potential *Daubert* issue from being writ worthy.

This Court should not reach the admission of Dr. Jaffe's testimony, because Louisiana procedural law[5] renders any *Daubert* challenge to their testimony moot. Prior to trial, Diamond took interlocutory writs to the Louisiana Fourth Circuit Court of

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[5] *See e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), state *forum non conveniens* law applies in maritime cases and is not preempted by federal maritime law because the state law did not work a material prejudice to a characteristic feature of general maritime law, and that uniformity is not required on matters related to procedure.

Appeal, which held that there was "no abuse of discretion" in the trial court's denial of Diamond's motion to exclude Mr. Jaffe's testimony. *See Lewis v. Odeco*, 2006-C-1485 (La. App. 4th Cir. 11/14/06) ("Writ Denied. We find no abuse of discretion by the trial court."). On appeal, the Fourth Circuit refused to revisit that issue, relying on the "law of the case doctrine" to find that it had already reviewed that issue, and would not do so again. *See* App. 11-12.

Accordingly, before any court could properly reach the *Daubert* issue, it would have had to find error in the intermediate appellate court's handling of the issue. Yet, Diamond did not even assert a single reason in its writ application for why the law of the case doctrine was improperly applied. "The law of the case principle is not applied to prevent a higher court from considering the correctness of a ruling by an intermediate appellate court. *Pitre v. Louisiana Tech University,* 673 So.2d 585, 589 (La. 1996), *cert. denied,* 519 U.S. 1007, 117 S.Ct. 509, 136 L.Ed.2d 399 (1996)." *Levine v. First National Bank of Commerce*, 948 So.2d 1051, 1057 (La. 2006). Nonetheless, unless consideration of an issue previously decided by a lower court is necessary for advancement of the law, the first step in determining whether to review an issue subject to the "law of the case" doctrine in a lower court is to determine whether the lower court erred in its discretionary application of the doctrine to its own ruling. *See Pumphrey v. City of New*

Orleans, 925 So.2d 1202, 1208 (La. 2006).[6] Diamond does not even bother to explain how this case presents a *Daubert* issue for this Court, since any purported *Daubert* issue with regard to Dr. Jaffe was settled long ago, on interlocutory writs, and the Louisiana appellate courts properly applied their own rules of appellate review to conclude that reconsideration of the issue was procedurally improper.

II. There is no writ worthy issue regarding the sufficiency of the evidence

The standard of review is narrow on a causation issue since a seaman is entitled to recover if it is shown that the fault of the defendant played any part, however small, in causing the injury. If there is any evidence from which the jury may infer that negligence played some contributing role in bringing about the injury, even though entirely circumstantial the burden of proof is met. *Rogers v. Missouri Pacific*

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[6] This is logical because if a higher court simply ignores the doctrine, and reviews any issue subject to the doctrine anew, as if it had never been raised before, then the purposes of the law of the case doctrine are frustrated. These purposes include avoiding relitigation of the same issue, promoting consistency of results, and encouraging efficiency and fairness to the parties by affording a single opportunity for the argument and decision of the matter at issue *See Coury Moss, Inc. v. Coury*, 981 So 2d 936, 939 (La. App. 3rd Cir. 2008), *writ denied*, 981 So.2d 936 (La. 2008); *Terrance v. Dow Chemical Co* , 971 So.2d 1058, 1063 (La. App. 1st Cir. 2007), *writ denied*, 970 So.2d 534 (La. 2007)

Railroad Co., 352 U.S. 500, 506-07, 77 S.Ct. 443, 447-48 (1957). The Fifth Circuit has frequently characterized this burden of proof as very light or featherweight. *See Vallot v. Central Gulf Lines, Inc.*, 641 F.2d 347, 350 (5th Cir. 1981). Moreover, the jury is entitled to make permissible inferences of causation from unexplained events. *Landry v. 2-R. Drilling Company*, 511 F.2d 138 (1975).

Dr. Jaffe's testimony was more than sufficient to meet that standard of proof, and even if it was not, there is no writ worthy issue to consider here – just an error in the application of a well-established rule. Contrary to Diamond's contention, the Court of Appeal's reliance on *Davis v. Odeco*, 18 F.3d 1237 (5th Cir. 1994), *cert. denied, sub nom., Murphy Exploration Company v. Davis*, 513 U.S. 819, 115 S.Ct. 78, 130 L.Ed.2d 32 (1994), was not error. *Davis* was not a pre-*Daubert* case, as Diamond contends. *Davis* had nothing to do with admissibility of expert testimony. Rather, *Davis* was a case which clearly held that the opinion of an expert, if admitted, that plaintiff's exposure to hydrocarbons caused him to contract a rare disease was sufficient to meet the "featherweight" standard because "there was not a complete absence of probative factual evidence on the issue of medical causation – as there must be to overturn a jury verdict under the Jones Act. *Id.*, at 1242.

If anything, it is Diamond that is trying to use this writ to entreat this Court to change the law, by conflating the *Daubert* test with the burden of proof

standard in maritime cases. Diamond would have this Court use the *Daubert* rule to decide whether the burden of proof has been met, thus eviscerating the "featherweight" standard of proof, instead of respecting that the *Daubert* issue relates to admissibility of evidence, leaving to the jury the role of evaluating the weight to be given to evidence presented to it. Current case law recognizes this distinction. There is no reason given by Diamond for this Court to grant writs and overturn that body of jurisprudence.[7]

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[7] Interestingly, in the *Davis v. Odeco* case, the defendant sought writs to this Court making the identical argument Diamond makes herein:

> The age of "toxic tort" litigation is upon us. In increasing numbers, litigants are asking lay juries to decide complex medical issues which decades of medical experts have been unable to resolve. The Fifth Circuit's decision, if allowed to stand, means that any Jones Act claimant may, on the most scant medical evidence, establish employer negligence and medical causation to support a jury award for any disease which develops, regardless of the tenuous connection between employment and genesis of the disease. This is an issue of significant importance, as a single medical witness who makes a causal connection for a Jones Act plaintiff under his "featherweight" burden of proof can *12 now establish employer liability. This is a departure from the direction of this Court's decisions, such as *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

Murphy Exploration & Production Company, Petitioner v. Willie Earl Davis, Respondent, 1994 WL 16101716 (Appellate Petition,

(Continued on following page)

III. There is no writ worthy issue about maintenance and cure for an incurable disease.

Maximum medical cure occurs when "it is probable that further treatment will result in no betterment in the claimant's condition." *Rashdi v. Am. Presidential Lines*, 96 F.3d 124, 128 (5th Cir. 1996). *See e.g., Boudreaux v. United States,* 280 F.3d 461, 468 (5th Cir. 2002). ("As the court found that further treatment would, in fact, improve Boudreaux's condition, it necessarily follows that he has not reached maximum medical cure.").

Both Dr. Carter, the treating physician, and Dr. Jaffe testified that Mr. Lewis would improve, if he continued to receive chelation therapy and hyperbaric treatment, although he would never be cured. P. Ex. 8, at 138. The jury was shown a video tape documenting the effects of the treatment, and showing that Mr. Lewis has regained some use of his extremities as a result of treatment. *See* P-Ex. 20. Dr. Paul Harsch, the doctor administering these treatments, concurred that more treatment would produce even further gains. Supp. Tran. 9-18-07, IV of 8, at 13-16.

There was no error in the application of these facts to the law. The jury was free to reject Diamond's

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Motion and Filing) (U.S. Jun. 10, 1994) Petition for Writ of Certiorari (No 931986) This Court denied certiorari. *Murphy Exploration & Production Co. v. Davis*, 513 U.S. 819, 115 S.Ct. 78, 130 L.Ed.2d 32 (1994).

repeated mantra that Mr. Lewis' condition was "incurable," and accept the more humane view that anything that would improve his condition should be done, and the law provides that Diamond is liable for any expenses incurred in so doing.

Moreover, if there was error, it was harmless. The Court of Appeal shifted a future medical care award of $1.2 million from general damages to "cure." If these damages were not available as "cure," they were available as general damages, and so Mr. Lewis has received no undue recovery.

IV. There is no writ worthy issue about future cure.

Future cure is awardable in certain circumstances. Future maintenance and cure can be awarded only in "such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained," at the time of the award. Moreover, maintenance and cure cannot be awarded beyond the time when maximum possible cure has been affected, and the seaman's physical condition has become fixed beyond further improvement. *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 532 (9th Cir. 1962), citing *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 531-32, 58 S.Ct. 651, 82 L.Ed. 993 (1938).

Respondent's complaint here is that there was an error in the factual finding that Mr. Lewis' need for

care was "immediate" and for a "period which can be definitely ascertained." Such alleged factual errors do not present a writ worthy consideration for this Court.

Moreover, any error is moot. If "future cure" should not have been awarded, the amount of "future cure" awarded here, $1.2 million, would have to be added back into general damages, from which it was subtracted by the Court of Appeal. At the end of the day, the amount of Mr. Lewis' recovery is completely unaffected.

V. There is no writ worthy issue with regard to collateral payments.

Diamond attempts to fabricate a legal issue with regard to alleged collateral payments made to the Lewises, for which it should have received a credit against its cure award. Pretermitting the issue of whether the collateral source rule applies, the Court of Appeal rejected any credit because Diamond failed to carry its burden of proof with regard to the existence or amount of such collateral payments. Moreover, Diamond failed to plead the affirmative defense of set-off as it was required to do in order to claim this credit. Even if there was a mistake as to

the proof,[8] which there was not, no legal error worthy of this Court's attention was committed.

CONCLUSION

For the reasons expressed herein, petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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[8] There was no mistake as to Diamond's failure to prove its claim. The only evidence it can point to are the Lewis' medical records, which were admitted by stipulation. Diamond, however reserved the right to question Mr Lewis about whether any expenses reflected therein were "actually incurred," *see* Supp Trans 9-18-08, III of 8, at 5, but it did not avail itself of this opportunity Moreover, while the records might show who paid some of the bills, such as Medicaid or Mr. Lewis' private insurer, they do not show what subrogation rights attached to these payments. If Medicaid had a right to subrogation (which it does under federal law) or if Mr. Lewis' insurer had such a right under the terms of the insurance policy (which is customary), then these "collateral" payments were not free of cost to Jimmy Lewis, and allowing Diamond a set-off would double penalize Mr. Lewis for them.

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No. 09-769

Supreme Court, U.S.
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In The
Supreme Court of the United States

DIAMOND OFFSHORE DRILLING, INC.,

Petitioner,

versus

JIMMY LEWIS,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

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MAY IT PLEASE THE COURT:

Petitioner, Diamond Offshore Drilling Inc. (hereinafter "Diamond"), respectfully submits this brief reply to respond to the opposition filed by respondent, Jimmy Lewis. Although petitioner takes issue with the *entire* premise of plaintiff's opposition, most of the arguments have been sufficiently addressed and properly refuted in Diamond's original Petition for Writ of Certiorari. However, several specific new issues raised by respondent in his opposition, most particularly his "Statement of the Case", are so blatantly erroneous and misleading that they must be addressed herein.

1. Writ Worthy Issues Presented

Under Rule 10 of this Honorable Court, review on a writ of certiorari is a matter of judicial discretion which is appropriate when a state court of last resort has decided important federal issues in a way that conflicts with United States court of appeals. As is set forth in petitioner's original writ, this is precisely the case here. Although respondent claims that there are, allegedly, "no writ worthy" issues presented because the standard of review on causation is narrow under the Jones Act, this has *no* legal bearing on the issues before this Court. Quite simply, the Louisiana Court erroneously confused the standard regarding burden of proof in a Jones Act case with the standard for admissibility of evidence. As has been held by the Second, Fifth, Sixth and Ninth Circuits, the standard

of proof of the former in no way relaxes or changes the admissibility standard of the latter.[1] Moreover, the Louisiana Court has completely misapplied general maritime law, which does *not* allow an award for maintenance and cure for an *incurable* disease. This Court has consistently held that there is no obligation to pay maintenance and cure when a seaman's condition is incurable. *Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707 93 L.Ed. 850 (1949). General maritime law has also consistently held that there is no obligation to pay cure into the *future*. The Louisiana Court also committed clear error and violated general maritime law principles by failing to offset expenses paid by others when the seaman has not contributed to those expenses. Thus, the state courts' direct violation of *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 1135 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and the Jones Act, the erroneous interpretation and misapplication of general maritime

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[1] As held in *Seaman v. Seacor Marine, L.L.C.*, 2009 WL 115879 (5th Cir. 4/30/09) held: "The reduced burden of establishing proximate cause in Jones Act cases, *see, e.g., Landry v. Two R. Drilling Co.*, 511 F.2d 138, 142 (5th Cir. 1975) (describing the burden as "featherweight"), is irrelevant to our holding. The standards of reliability and credibility to determine the admissibility of expert testimony under *Daubert* and Rule 702 apply regardless whether a seaman's burden on proximate causation is reduced. *See Wills v. Amerada Hess Corp.*, 379 F.2d 32, 47 (2nd Cir. 2004) (stating this rule and emphasizing that the Federal Rules of Evidence and the applicable standard of causation are "distinct issues and do not affect one another") (quotation omitted)."

law for *future* cure, and the manifestly erroneous award of maintenance and cure for an *incurable* disease, necessitate careful review and clearly present "writ worthy issues" in the instant case.

2. "Law of the Case" Doctrine is Inapplicable

In his opposition, respondent claims that the law of the case doctrine precludes supervisory review of the *Daubert* issue presented by Dr. Russell Jaffe's purported expert testimony because the issue was, allegedly, "settled long ago." This claim has no basis in Louisiana law. Once the trial court erroneously ruled that Dr. Jaffe's improper testimony was admissible, petitioner filed an Application for Supervisory Writs with the Louisiana Fourth Circuit Court of Appeal. The appellate court did not rule on the issue but simply ***denied*** the writ. Generally, under Louisiana law, when an appellate court reviews and considers arguments made in a supervisory writ application, the court's disposition on the issue considered becomes the "law of the case" foreclosing relitigation of that issue either at the trial court on remand or in the appellate court on a later appeal. *Diamond B Const. Co., Inc. v. Department of Transp. and Development*, 02-0573 (La. App. 1 Cir. 2/14/03) 845 So.2d 429, 434, citing *Easton v. Chevron Indus., Inc.*, 602 So.2d 1032, 1038 (La. App. 4 Cir. 1992). However, the ***denial*** of a writ application creates a totally different situation. A denial of supervisory review is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction, and it does *not* bar reconsideration of, or a different

conclusion on, the same question when an appeal is taken from a final judgment. *Id.*, citing *Dupre v. Maynard*, 96-1183 (La. App. 1 Cir. 3/27/97) 692 So.2d 36. The "law of the case" principle is merely a *discretionary* guide, as acknowledged by the state appellate court in the case at bar. (*See* App. 11, attached to original petition). It should *not* be applied mechanically as to accomplish manifest injustice, as in the case at bar. *See e.g., Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 256 So.2d 105 (La. 1972).

3. Plaintiff Agreed With SIBM Diagnosis and His Expert Opined that Heavy Metal Poisoning Caused Plaintiff's SIBM

Despite his assertions to this Honorable Court, during the course of this litigation, plaintiff never disputed his diagnosis of sporadic inclusion body myositis ("SIBM"). The undisputed evidence contained in the record establishes that Mr. Lewis first became symptomatic in ***1991*** – years before going to Venezuela to work for ODECO and before he even became a Diamond employee in 1992. The uncontroverted testimony of *all* of the doctors was that SIBM is a very slow, progressive neuromuscular disease that develops over many years before it becomes symptomatic. This testimony, which was *not* contested by plaintiff on appeal, was that Mr. Lewis had SIBM for at least five (5) years before going to Venezuela and at least six (6) years *before* he even began his employment with Diamond in 1992. As

such, the diagnosis of SIBM is, in fact, fatal to his claim against Diamond.

4. No Evidence of Exposure to Heavy Metals or Toxins

Although plaintiff has tossed about a number of purely speculative theories regarding causation,[2] he seems to have settled, for purposes of his opposition, on an oil-based mud compound used in drilling, commonly referred to as Soltex. In his opposition, respondent argues that oil-based drilling mud was "dumped over" the side of the rig near the vessel's water intake. Now according to Mr. Lewis, *this* is what allegedly caused his disease.

The record reveals that plaintiff has consistently asserted that within a few days of arriving in Venezuela and boarding the OCEAN SPARTAN, he "began to suffer from diarrhea and nausea." He further claims that these symptoms continued "during his entire thirty day hitch in Venezuela." Mr. Lewis has stated in the record that his symptoms would cease when he went home to New Orleans, but that the diarrhea and nausea would begin again *immediately* upon his return to Lake Maracaibo.

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[2] Plaintiff has alleged that any number of things caused his neuromuscular disease, ranging from viruses, food, water, Barite and Mercury. None of these theories could be proven and were, apparently, abandoned by plaintiff in favor of his latest theory regarding Soltex, an oil-based mud compound.

However, this cannot be linked to oil-based drilling mud. First of all, the record does *not* contain any evidence that Soltex was actually used aboard the OCEAN SPARTAN.[3] Secondly, even if it could be established that Soltex was used in the drilling process, the record does *not* show exactly *when* the compound was allegedly used. As the evidence presented at trial established, thirteen (13) wells were drilled by Diamond in Venezuela.[4] However, according to IADC drilling reports, *only two (2) of the thirteen (13) wells* drilled by the OCEAN SPARTAN required oil-based mud and then only for a *limited amount of time*. All of the other wells in operation while Mr. Lewis was assigned to the rig in Venezuela were ***water-based***, meaning that Soltex was *not* used. The testimony given at trial established that on the limited occasions when oil-based mud was used, it was pumped into the tanks on barges next to the rig. The OCEAN SPARTAN contained pollution rails around the hoppers that would catch the overflow of any mud. James Chatham, a Diamond derrickman called by plaintiff in his case in chief, testified that there *never* was any problem with any oil-based mud,

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[3] There is also no evidence that the oil-based mud used in Venezuela was any different than that used by drilling operations in the Gulf of Mexico. Mr. Lewis admittedly *never* got sick when he worked in the Gulf, only allegedly in Venezuela.

[4] The IADC drilling reports were analyzed by Calvin Barnhill, defendant's expert on drilling operations, and contained the names of all Diamond personnel aboard the rig. They were *not* contradicted by plaintiff.

and that he could *not* recall ever dumping any oil-based mud in the lake. Although small amounts of mud may have washed overboard, the oil-based mud was typically vacuumed off the drill floor and discharged onto one of the barges tied adjacent to the rig. In contrast, the ***water-based*** mud, which is considered environmentally friendly, could be hosed overboard. It is not uncommon to dump water-based mud overboard, which is routinely done throughout the industry.

Significantly, the first well that used ***oil-based*** mud was well number 4. Diamond did not even begin using the oil based mud until August 1992 – *seventeen (17) months after* the rig was moved to Venezuela. It was not disputed at trial that plaintiff was only aboard the rig twenty (20) days during the time well number 4 was in operation. The other well that used oil-based mud was well number 7. Oil-based mud was used in conjunction with this well between March – August 1993. During that time, Mr. Lewis *only* worked one (1) single 28-day hitch. This is significant because Mr. Lewis claims that he got sick and started having symptoms *immediately*, as soon as he got to Venezuela, and that these symptoms continued the *entire* time for *every* hitch he ever had on Lake Maracaibo. However, only two (2) of the wells in operation *ever* used oil-based mud, and Mr. Lewis was only aboard for a limited time during each operation. Thus, the facts simply do *not* support his vague claim that the he was "poisoned" with heavy

metals that made him sick the *entire* time during *each and every* 30-day rotation he had aboard the rig.

5. No Evidence that Water Making System was Faulty

In his "Statement of the Case", respondent insinuates that the water making system aboard the rig was somehow to blame. This is illogical.[5] As the record establishes, the Alpha Naval water making system was *not* used when the OCEAN SPARTAN initially went to Venezuela. Potable water was sent out to the rig on barges and pumped into the potable water tanks aboard the rig. Any diarrhea or illness that plaintiff initially experienced when he first went to Venezuela could *not* have been caused as a result of water that was coming from the water maker unit. Further, there were no instances where lake water was pumped directly into the potable water tank. Felix Noel, the motorman aboard the rig, who was responsible for maintaining the Alpha Laval water making system could not recall a single instance where lake water flowed directly into the potable water tank. Wade Reasons, the offshore installation manager and person ultimately responsible for operations aboard the rig, corroborated the testimony

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[5] Notwithstanding plaintiff's faulty theory, if there was a problem with the water maker, which is specifically denied and contrary to the facts of this case, such would necessarily constitute an unseaworthy condition of the rig. The jury concluded no unseaworthy condition caused plaintiff's illness.

of Mr. Noel that prior to water being consumed aboard the rig, it went through five (5) filters as it left the potable water tanks and was also subject to a sterilization process. When asked if he was aware of lake water *ever* being pumped directly into the potable water tanks, Mr. Reasons stated emphatically, "that has never happened." Significantly, the witness testimony was *not* disputed that, prior to the water maker system being used in Lake Maracaibo, the water was tested and analyzed not once, not twice, but on three (3) separate occasions.

6. Plaintiff's Tests for Heavy Metals Were Within NORMAL LIMITS

Even though plaintiff did *not* prove that he contracted SIBM from heavy metal exposure *or* toxins that were *ever* present aboard the vessel at issue, the record establishes that tests for heavy metals in his system negated his speculative theory. To the contrary, Dr. William George, Director of Toxicology at Tulane University, testified that the tests performed on plaintiff at Ochsner in May 1998 (only two (2) years after he voluntary left Diamond) were all well within ***normal* limits**. Mr. Lewis simply did *not* have elevated levels of heavy metal in his system. In fact, all of the diagnostic tests there were done to check Mr. Lewis' level of heavy metals, even the ones done with chelation at the request of his alleged expert, Dr. James Carter, were within ***normal* limits**. It is significant to note that because plaintiff could *not* prove causation as to SIBM, he now claims

that the "true" cause of his illness is the alleged dose of heavy metals he allegedly ingested aboard the rig. This is patently false. As the record establishes, at no time during this trial did Mr. Lewis *ever* dispute his well-established diagnosis of SIBM, which was made by multiple doctors including those treating Mr. Lewis. His suggestion before this Honorable Court that his neuromuscular disease is anything other than SIBM is inconsistent with the undisputed trial testimony of Plaintiff's experts. Nonetheless, the argument that his neuromuscular disease was "caused" by heavy metals is flawed as there is *no* evidence that he *ever* had elevated levels of heavy metal in his system.

7. Unproven Theory Only Allegedly Applies to this Particular Plaintiff

At trial, the plaintiff presented nothing but *pure speculation* from alleged "experts" who have, admittedly, *never* previously treated anyone with SIBM. Although plaintiff's purported medical experts, Drs. Carter and Jaffe, acknowledged that the cause and treatment of SIBM is ***unknown*** (much like Lou Gehrig's disease), they had the audacity to claim that they alone "figured out" what caused *this particular plaintiff* to contract SIBM and that they could treat *this particular plaintiff* – but that their theory did not apply to *any* other SIBM patient. Thus, the "expert" testimony offered by these clearly unqualified testifying experts fails under *Daubert* and therefore amounts to *no* evidence of causation, even under the

low threshold causation standard applicable in Jones Act cases. As confirmed in Plaintiff's Opposition, his expert, Russell Jaffe, opined that Plaintiff's paralysis *was caused by SIBM* (p.12 Pl. Opp.) and that SIBM was caused by heavy metal poisoning (p.11 Pl. Opp.). However, Plaintiff's expert's testimony fails under *Daubert* precisely because, as noted by Plaintiff in his brief, Dr. Jaffe was not familiar with SIBM before meeting Plaintiff and his testimony regarding causation is speculative ("toxic metals at the level Mr. Lewis was exposed to them *might well have under certain conditions* accumulated in him . . . " (p.11 Pl. Opp.)).

Unbelievably, on page 15 of his opposition, respondent alleges that Dr. Jaffe was called on to study the "*specifics* of Mr. Lewis' case . . . " (emphasis added). According to respondent, while he is not qualified to testify as an expert on SIBM, Dr. Jaffe is allegedly an expert on the effect of heavy metals. Notwithstanding the fact that there was *no* evidence presented regarding exposure to heavy metals aboard the rig *or* the existence of alleged heavy metals in plaintiff's system, the law prohibits such unsupported conjecture. For example, in *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347 (5th Cir. 2007), the court noted that there is a two-step process in examining the admissibility of causation evidence in toxic tort cases: first, whether there is admissible *general causation* evidence; and, if so, where there is admissible *specific causation* evidence. *Id.* "General causation is whether a substance is capable of

causing a particular injury or condition in the **general population**, while specific causation is whether a substance caused a particular individual's injury." (Emphasis added) *Id.* (citations omitted).[6] **Evidence concerning specific causation is admissible *only* as a follow-up to admissible general-causation evidence**. *Id.* Here, there are absolutely *no* studies or evidence regarding *general causation* as theorized by plaintiff.[7] Instead, the studies on which Plaintiff's expert relied (and cited in his Opposition) were not studies about SIBM or even the type of inclusion body myositis with which he diagnosed Plaintiff (p.13 Pl. Opp.). Even if the Court were to reach the issue of specific causation, Plaintiff's expert failed to prove specific causation when he could not offer the length or amount of exposure to the alleged heavy metals that caused Plaintiff's SIBM and how that exposure was similar to other cases of SIBM (p.12 Pl. Opp.). Thus, in setting out Plaintiff's evidence of causation, Plaintiff's Opposition demonstrates the specific expert testimony that fails to meet standards for admissibility of expert testimony.

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[6] *See also Seaman v. Seacor Marine, L.L.C.*, 2009 WL 115879 (5th Cir. 4/30/09) and *LeBlanc v. Chevron USA, Inc.*, 2007 WL 1772057 (E.D.La. 6/18/07).

[7] Rather, the only study even mentioned in the record is an irrelevant study from Sweden that has absolutely nothing to do with plaintiff's theory that heavy metals could cause SIBM.

Accordingly, for the reasons set forth above, as well as those contained in the original Petition for Writ of Certiorari, Diamond Offshore Drilling Inc. prays that its writ will be granted by this Honorable Court.

Respectfully submitted,

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